Supreme Court, U.S.
FILED

No. 991430 FEB 29 2000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ALEXANDER G. LUNNEY, an infant, by his father and natural guardian, J. ROBERT LUNNEY,
Petitioner,

v.

PRODIGY SERVICES COMPANY
(a partnership of Sears, Roebuck & Co. and International Business Machines Corp.),
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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PETITION FOR A WRIT OF CERTIORARI

J. ROBERT LUNNEY
Of Counsel
LUNNEY & MURTAGH, LLC
81 Main Street
White Plains, NY 10601

ROBIN S. WHITEHEAD
Of Counsel
MORALITY IN MEDIA, INC.
475 Riverside Drive
New York, NY 10115

BRUCE A. TAYLOR
Counsel of Record
NATIONAL LAW CENTER
FOR CHILDREN AND FAMILIES
3819 Plaza Drive
Fairfax, Va 22030
(703) 691-4626

Attorneys for Petitioner

87pp

QUESTIONS PRESENTED

1. Whether the New York Court of Appeals violated the Supremacy and Commerce Clauses in treating Respondent Prodigy Services Company as if it were a telecommunications carrier, by extending common law carrier immunities to such a non-carrier computer service provider, in contravention to federal law which specifically forbids treating "interactive computer services as common carriers or telecommunications carriers."

2. Whether the Petitioner's rights to Equal Protection of the laws under the Fourteenth Amendment were violated by the decision of the New York Court of Appeals to grant special carrier treatment to non-carrier Respondent, since regulated carriers are entitled to their common law immunity against individual suits in exchange for the protection of the public that results from government regulation of carriers, whereas Respondent Prodigy Services Co. was granted unconditional immunity from private suits even though it is not subject to the government regulations that would protect the public from individual harms, thus depriving Petitioner of any right to seek redress from a court against Respondent nor from a regulatory agency as would be possible if Respondent's alleged injuries had been inflicted by a true regulated carrier.

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IN THE SUPREME COURT OF THE UNITED STATES
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ALEXANDER G. LUNNEY, an infant, by his father and natural guardian, J. ROBERT LUNNEY,
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PRODIGY SERVICES COMPANY
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Alexander G. Lunney, respectfully petitions this Honorable Court for a writ of certiorari to review a judgment of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the New York Court of Appeals, 1999 Slip Op. 10292 (December 2, 1999), is reported at 94 N.Y.2d 242. That opinion is also reported at 28 Media L. Rep. 1090, and 1999 WL 1082126. The opinion of the New York State Supreme Court, Appellate Division, Second Department, is reported at 250 A.D.2d 230, 683 N.Y.S.2d 557. The orders of the Supreme Court for Westchester County, Index No. 21886/94, entered July 5, 1996, July 2, 1997 and January 14, 1998 are unreported. These opinions and orders are reproduced in the appendix.

JURISDICTION

The New York Court of Appeals entered its Opinion on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS OF LAW

United States Constitution

Article I, Section 8:
"The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States ....

Article I, Section 10:
"No State shall ... pass any ... Law impairing the Obligation of Contracts ....

Article VI:
"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Telecommunications Act of 1996

Communications Decency Act, Title V, Sec. 502, 110 Stat. 135, 47 U.S.C. § 223 (e)(6):

"... Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."

Communications Decency Act, Title V, Sec. 509, "ONLINE FAMILY EMPOWERMENT", 110 Stat. 137-38:

47 U.S.C. § 230 (c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.—

(1) TREATMENT OF PUBLISHER OR SPEAKER.—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.—No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

STATEMENT OF THE CASE

Petitioner Alexander Lunney, a minor, sued Prodigy Services Company ("Prodigy") in the New York State Supreme Court for Westchester County on December 22, 1994, alleging three causes of action (1) libel *per se*, (2) negligence, and (3) harassment/infliction of emotional distress. At issue are statements published on Prodigy's proprietary network through nine fictitious memberships opened for an impostor or conspirator by Prodigy in the name of Petitioner, who at the time was a 15 year old minor, a Boy Scout, a student at Bronxville High School,

and never a member of Prodigy. Those statements attributed to Petitioner several explicit obscenities, criminal threats of rape, assault, sodomy, and murder, as set out in the attached *Affidavit of Alexander G. Lunney*.[1] Also at issue was Prodigy's refusal to correct the situation after being informed by Petitioner that those accounts were not opened or used by him, along with Prodigy's refusal to stop attributing the conduct to him.

Finally, Petitioner Lunney sued for the separate defamation inflicted on him by Prodigy when, even after knowing that these heinous and unlawful wrongdoings were not being done by this boy, affirmatively posted notices accusing Petitioner of being a delinquent debtor and a credit card fraud. Prodigy has refused to disclose the identity of the impostor who was responsible for opening those accounts.

The N.Y. Supreme Court for Westchester County denied Prodigy's three motions for summary judgment, but did not reach any final factual decisions on the merits prior to appeal. The trial court, in it's first denial Order of July 5, 1996, held that it was unable to rule as a matter of law that Prodigy was not a publisher, in view of the powers it reserved in its service agreement. The trial court also directed the parties that, on any renewed motions, they were to address the viability of *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (Supreme Ct., Nassau County, 5/24/1995), in light of the Telecommunications Act of 1996 (Pub. Law 104-104), and *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 6/11/1996). (*See* Appendix hereto, App. 32.)

Prodigy then appealed the two later Orders which denied the last two motions for summary judgment to the

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[1] *Affidavit of Alexander G. Lunney*, N.Y. Supreme Court Index No. 21886/94, filed Dec. 1, 1997, and made part of the record on appeal in the Appellate Division and N.Y. Court of Appeals. A copy is reproduced in the Appendix hereto, App. 33-51.

Appellate Division of the Supreme Court, where that court reversed and granted Prodigy's motion for summary judgment. The Appellate Division purported to extend a common law phone carrier immunity to Prodigy, stating, 250 A.D.2d at 231 (App. 14): "Applying a privilege recognized by the common law of this State, and historically afforded to telegraph companies (see, *Anderson v. New York Tel. Co.*, 35 N.Y.2d 746, *revg* 42 A.D.2d 151 on dissent of Witmer, J.) we conclude that Prodigy is entitled to summary judgment."

The Appellate Division based its summary judgment on its own factual "observations" that, in its view, the statements "do not immediately appear to be defamatory" nor to be "of or concerning" the infant Petitioner, stating, 250 A.D.2d at 233 (App. 17): "At most, one could read into the e-mail message a statement of fact to the effect that the plaintiff is a bully who has threatened to sodomize a scout leader's son."

The Appellate Division's rule of law, later adopted by the Court of Appeals, expands the traditional common law principles of carrier liability into one of absolute immunity for "internet service providers" ("ISPs"), holding, *id.* at 233 (App. 17): "Assuming that such a statement could indeed be defamatory, we conclude that Prodigy cannot be held legally responsible for it, nor for the allegedly defamatory bulletin board postings, because (1) Prodigy did not publish the statement, and (2) even if Prodigy could be considered a publisher of the statement, a qualified privilege protects it from any liability given the absence of proof that Prodigy knew such a statement could be false."

Petitioner was denied the opportunity to exercise his Due Process right to prove the necessary elements of even the *Anderson* rule of common law carrier privilege by the appeal courts' unilateral determinations of the operative facts, even though Petitioner alleged and submitted an

Affidavit (App. 33-51) outlining facts that could support guilty knowledge and *scienter* sufficient to state a claim against a telephone/telegraph carrier if established at trial. Petitioner offered to prove that Prodigy did have knowledge of those statements and did know those statements were in fact false and continued to allow the false statements to be published. In addition, Prodigy itself independently posted its own messages accusing Petitioner by name of being a fraud and malicious criminal. That separate and specific cause of action against Prodigy for its own affirmative attack on Petitioner's character was not addressed by either appellate court below and was dismissed as part of the absolute immunity the New York courts expanded and extended to Respondent Prodigy.

The Appellate Division also relied upon the CDA in that it held that the court's "application of the common-law qualified privilege recognized in *Anderson* also renders the outcome in this case in complete harmony with current Federal statutory law contained in the Communications Decency Act of 1996 (47 U.S.C. §230)." 250 A.D.2d at 238 (App. 25). Thus, the Petitioner's arguments relating to the mis-application of the "Good Samaritan" conditional immunity of the CDA were preserved for this Court.

Petitioner appealed to the State Court of Appeals, which affirmed the Appellate Division on December 2, 1999. The Court of Appeals assumed defamation (App. 4): "For purposes of this opinion, we will assume that although he was not directly attacked, Lunney was defamed by being portrayed as the author of the foul material." The Court of Appeals then adopted the Appellate Division's rule of absolute immunity for ISPs to order dismissal of all causes of action against Prodigy (App. 5), referring to the rule as "the common-law privilege accorded to telephone and telegraph companies" (App. 7), but stated that it declined to rule on the application of the CDA (App. 9-10).

At the time the obscene and libelous messages were published on its proprietary network, Prodigy was soliciting members by solely requesting any name and address. No process for verification of the legitimacy of any person applying for membership was employed by Prodigy. A primary concern of Prodigy was establishing itself in this market and "how quickly someone could have full access to the full Prodigy service and sign up for... the more expensive parts of the service...[Members] had to have full access in their [Prodigy's marketing people] eyes." (App. 34)[2] Plaintiff alleged that this business practice was negligent, reckless and below the industry standard of care.

Prodigy itself accused Petitioner of transmitting the abusive, obscene, and sexually explicit material through the Prodigy service (App. 37). After receiving his denial and demands for all relevant material, Prodigy, by instructions published on its network, ordered its personnel not to give Petitioner any information (App. 37). Thereafter, Prodigy maliciously published its own notice falsely accusing Petitioner, by name, of credit card fraud and obscenity (App. 37). These notices were transmitted by Prodigy months after this action was commenced (App. 38).

Prodigy advertised itself as a private, commercial online service provider ("OSP") that is a family interactive network with 2 million members, including more than 300,000 minor children. Members were encouraged to send electronic messages and communicate with one another on its internal network in accordance with guidelines as to the content of such communications established by Prodigy. Prodigy reserved the right to remove or refuse to send messages offensive to its own guidelines. Prodigy marketed its programs for "Home/Family/Kids" and one of its stated corporate

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[2] *See* Lunney *Affidavit*, ¶ 3, quoting from deposition of Prodigy Security Program Manager, Alexander Bidwell.

missions was to have children connect with their world through entertainment. (App. 42-43.)[3]

It was industry practice by the other online service providers to verify the identity of prospective members. The other major OSPs (e.g. CompuServe, America Online) require that the identities of members be verified by credit card before access was allowed to their systems. (App. 45.) Prodigy decided that, rather than risk the potential loss of business, it would risk publication of the vile, obscene, and libelous messages it had found endemic in the opening of unauthorized and fictitious memberships. (App. 45.)

Although Prodigy was authorized by its members to police the content of messages sent on its Service, virtually the only warning acted on by Prodigy as to fictitious memberships was the non-payment of service charges, which would not result in the termination of the abuse for periods as long as four months. (App. 45-46.)

Prodigy argued that it was not responsible for these publications by claiming to be akin to a mere utility and characterizing the messages solely as "email." At least two of the messages published in Petitioner's name were labeled by Prodigy itself as "Bulletin Board" messages and thus were posted for general viewing by millions of Prodigy members. (App. 46.)

With regard to "email" and bulletin board messages, Prodigy is not a post office or a telephone monopoly governed by strict utility regulations. The privacy of computer transmitted messages as they are being published is governed by the agreement of the on-line service provider and its members. If the message is in computer storage, as it must be if placed in the addressee's computer "mailbox", there is nothing prohibiting a service provider, such as Prodigy, from accessing the messages to assure a

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[3] *Affidavit* referencing depositions of Prodigy's Member Security representative, Wm. McDowell, and of Mr. Bidwell, *supra*.

member's compliance with the "Content Guidelines" promulgated by Prodigy. (App. 46.)

REASONS FOR ALLOWING THE WRIT

This case is the perhaps the most egregious of a series of "Internet related" liability cases that have developed an enlarging rule of law that totally immunizes non-carrier proprietary online services from virtually any tort or criminal liability, without having them answerable either to the public through government regulatory agencies nor to private parties through civil actions in the courts of law. This development of immunity law for the benefit of Internet Service Providers is unprecedented, unwarranted, completely opposite the intent of Congress in enacting the "Good Samaritan" liability provisions of the CDA, violative of the Supremacy, Commerce, and Obligation of Contracts clauses of and the Fifth and Fourteenth Amendments to the Constitution, and this young Petitioner submits that it is time for this Honorable Court to reverse this rule of law.

If the minor Plaintiff in this case had been injured at the hands of a regulated carrier, his burden of proof would be set by established common law liability principles for "publisher" and/or "distributor" liability. If he could prove the requisite control or participation, adequate knowledge or *scienter*, and sufficient malice or disregard, he would state a claim for relief in a federal or state court of law. If he could not meet the proof elements in court, then his cause of action would fail, but he would not be without any remedy. He could still petition a government regulatory agency for redress of like grievances and an agency, such as the Federal Communications Commission or the New York Public Service Commission, could act to protect the public at large from harmful activity in the future.

The true telecommunications carriers who carry the phone and modem traffic of and for the Internet and World Wide Web and Usenet and BBSs are common carriers that are regulated by and answerable to the FCC and state utility commissions.[4] The independent and private computer services such as Respondent Prodigy Services Company, whether they are Online Service Providers ("OSP") and/or Internet Service Providers ("ISPs"), are not common carriers and are not regulated by the FCC[5] or state commissions, such as the New York Public Service Commission.[6] The telecommunications carriers that carry the Internet traffic between and among the various OSPs and ISPs (such as between Prodigy and America Online) are entitled to carrier immunity, but are correspondingly subject to government regulation for the sake of the common good. Ironically, the OSPs such as Prodigy and ISPs that have no proprietary content or services of their own are granted carrier immunity by the New York Court of Appeals but are not subject to any corresponding regulation by the federal or state governments because the federal Telecommunications Act makes it prohibited "to treat interactive computer services as common carriers or telecommunications carriers".[7] The result of the state court ruling below is that they are now answerable to no one, not even to the courts.

It can be fairly said without alarm or exaggeration that not only Respondent Prodigy, but all private interactive

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[4] *See* 47 U.S.C. § 151, *et seq.*,

[5] *See* 47 C.F.R. § 64.702(a). *See also Declaratory Ruling*, 14 F.C.C.R. 3689 (1999)

[6] N.Y. Public Service Law, Art. 5, Sec. 90, et seq.

[7] *See* 47 U.S.C. § 223 (e)(6), enacted as part of the Communications Decency Act of 1996 in Title V of the Telecommunications Act of 1996, P.L. 104-104, Sec. 502.

computer services,[8] including all OSPs and ISPs, are now answerable to no public or judicial authority for unprotected and dangerous tortious behavior. The public and individual citizens and users have no recourse at law or in regulation to protect either the general public interests or any person's private interest. This is a ruling of national application that will affect the interstate and foreign commerce authority of the federal and state governments and the rights of citizens here and abroad.

This expansive rule of granting virtual immunity from tort law to online service companies did not start with the CDA in 1996, but it should have ended with it.

The first judicial decision was in *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991), wherein the District Court disposed of a diversity action for libel and unfair competition. The trial court found that CompuServe, an online service provider, was the distributor of the statements involved, but was not liable as a matter of fact because there was no evidence that CompuServe "knew or had reason to know of the Rumorville statements" and that the unfair competition claim must fail for both lack of knowledge and the absence of proof to meet the burden that "the utterance of a disparaging statement must be intentional." *Id.* at 141-42. That decision applied the established test for distributor liability and recognized that the test served the purpose of protecting freedom of speech: "The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing

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[8] *See* 47 U.S.C. § 230 (e) (2): "INTERACTIVE COMPUTER SERVICE.—The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment." *Id.* at 139.

Then came *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794, 63 USLW 2765, 1995 WL 323710 (N.Y. Sup., Nassau County, 5/24/1995), *reh. denied*, 24 Media L. Rep. 1126, 1995 WL 805178 (12/11/1995), which held Prodigy's online service liable as a publisher, rather than a distributor, because it had, at that time, held itself out as attempting to control the content of its bulletin boards. CompuServe was held not liable, because it took no steps to monitor or police its system. The trial court reasoned that "PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice. For the record, the fear that this Court's finding of publisher status for PRODIGY will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure. ... Presumably PRODIGY's decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a market it perceived to exist consisting of users seeking a 'family-oriented' computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences. In addition, the Court also notes that the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which are pending in Congress, is enacted." *Id.*, Slip Op. at 5 (decision of 5/24/1995).

In 1996, Congress did enact the CDA as part of the Telecommunications Act and a specific provision was included to specifically overrule the *Stratton Oakmont*

dichotomy of rewarding the online services that encourage pornography and offensive materials and punishing those that try to restrict such offensive and harmful traffic. Congress acted to reverse the liabilities by protecting the "Good Samaritan" who acts for the public good. The civil immunity provision of the CDA imposed conditions to insure that its protection would only envelope those interactive computer services that use their private rights and powers to protect children and families from the pornography and offensive materials identified by Congress as harmful to the future health of the Internet and its attached computer services. As it was meant to be abundantly clear from a plain reading of the headings and chosen language of the new civil liability protections, the "Good Samaritan" immunity is an earned, conditional protection that is predicated on taking affirmative positive steps to block or screen pornography, violent, harassing, or otherwise objectionable materials, even if they are protected from government prosecution or regulation. The new section, 47 U.S.C. § 230, sets out several Findings in (a) and a Policy in (b) and then provides a private incentive to help carry it out in (c), the "Protection for 'Good Samaritan' Blocking and Screening of Offensive Material." Civil liability may not attach "on account of ... any action voluntarily taken in good faith to restrict access to" the offending matter.

By this language, Congress reversed the roles of liability set by *Stratton Oakmont* and established the rules of liability for Internet and online service companies. If a provider or a user takes actions in the public interest, then no liability may flow "on account of" those actions. If no actions are taken, "to restrict access to or availability of material that the provider or user considers" illegal or objectionable, then no protection is earned under this section. This section would empower those who would

help create a pro-family online portal and complement the hoped for deterrence of the newly defined crimes.

The criminal provisions of the CDA were intended to deter those who distribute indecent pornography from doing so when it would be knowingly displayed to minors and the "Good Samaritan" immunity was intended to enlist the industry to extend broader private protections than the law could accomplish by itself.

The clearly stated legislative intent of Congress was explicitly set out in the "Conference Report on the CDA" to explain the purpose, scope, and requirements for the "Good Samaritan" civil protections offered by new section 47 U.S.C. § 230 (c)(2)[9]:

"*House amendment*

> Section 104 of the House amendment protects from civil liability those providers and users of interactive computer services for actions to restrict or to enable restriction of access to objectionable online material.

Conference agreement

> The conference agreement adopts the House provision with minor modifications as a new section 230 of the Communications Act. This section provides 'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious

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[9] *Joint Explanatory Statement of the Committee of Conference*, Report for P.L. 104-104, Title V – Obscenity and Violence ("Conference Report on the CDA"), House Conf. Rep. No. 104-458, at 194, 1996 U.S.C.C.A.N. Leg. Hist. at 207-08.

> obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." (Emphasis added.)

Following the CDA, two cases, one in federal court and the other in state court, concluded that Congress granted a virtual license to online services to be immune from suit for defamation or even for distributing child pornography. Both courts reasoned that if an ISP/OSP is not a "publisher or speaker" then no liability can attach and neither court considered the "Good Samaritan" nature of the CDA's non-carrier protections. The federal court also found that there was no distinction remaining for "distributor" liability and that the CDA insulates online entities from both publisher and distributor liability. The federal case is *Zeran v. America Online, Inc.*, 958 F.Supp. 1124 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The state case is *Jane Doe v. America Online, Inc.*, 25 Media L. Rep. 2112, 1997 WL 374223 (Fla. Cir. Ct. 1997) (Order dismissing claims), *aff'd*, 718 So.2d 385, 27 Media L. Rep. 1119 (Fla. App. 1998), *review granted*, 729 So.2d 390 (Fla. April 12, 1999).

On the other hand, an English case considered and rejected the reasoning and conclusions of *Cubby, Stratton Oakmont, Zeran*, and the Appellate Division in *Lunney v. Prodigy* below. *Godfrey v. Demon Internet Ltd.*, No. 1998-G-No. 30 (Queens Bench, UK, 26 March 1999); 851 PLI/Pat 853; www.courtservice.gov.uk/godfrey2.htm.

In *Blumenthal v. Drudge*, 992 F.Supp. 44 (D. D.C. 1998), another District Court read the CDA as mandating immunity, even for doing nothing to restrict obscene or defamatory material, concluding, 992 F.Supp. at 49: "...Congress opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium."

(Emphasis added.) That court's own misreading of the CDA led to its decision to reluctantly apply a type of immunity that was the direct opposite of Congress' express language. The District Court admitted that it was not doing justice to the injured plaintiff nor to the precedents of common law, but felt convinced by the Fourth Circuit in *Zeran* to turn the CDA's Good Samaritan protection on its head. *Id.* at 51-53. That court inflicted an admitted "inequity" on the party before it, not because the CDA required it, but because the court misapplied the Good Samaritan immunity provision.

The expansive application of protections for Internet providers and users has even entered the criminal law, leading the courts to strictly construe the Commerce Clause against the states when it favors the Internet and reading the state criminal laws in an overbroad fashion when it supports a theory of unconstitutionality. *See American Library Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997); *ACLU v. Johnson*, 4 F.Supp.2d 1029 (D. New Mexico, 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

The Petitioner submits that this line of cases has misinterpreted federal statutory and Constitutional law, has been wrongly decided, and is depriving both federal and state rights of citizens, as well as the ability of the federal and state governments to protect the public good. Although only this latest wrong is now before the Court, this Petition presents an opportunity to correct a gross miscarriage of justice in this case. Correcting the error in the state court below would also aid state and federal courts nationwide in their adjudication of issues involving the Internet and the many serious problems facing members of the public who make use of the Internet to access the World Wide Web, Usenet, and the unregulated, proprietary offerings of Online Service Providers.

This inequitable and over-extended interpretation by the courts of the immunity granted under the CDA has also been recognized by legal scholars and commentators.[10]

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[10] "Because immunity conferred by section 230(c)(1) is based on the defendant's status as an interactive computer service, and appears to apply even to publications made in bad faith, it can be seen as an absolute privilege against liability for third-party speech." Fried, "Dodging the Communications Decency Act when Analyzing Libel Liability of On-line Services: *Lunney v. Prodigy* Treats Service Provider like Common Carrier," 1 COLUM. SCI. & TECH. L. REV. 1 (1999) (http://www.stlr.org/cite.cgi?volume=1&article=1) at ¶ 30.

"The court's recitation and expansive reading of section 230(c)(2) appears to have been unnecessary....The court might have been construing the provisions as conferring on service providers an implicit immunity from liability for decisions not to screen communications or make such screening possible, but reliance on section 230(c)(1) should have been sufficient....This still does not explain, however, the need to interpret the provisions as applying to libel as well as obscene, violent, or harassing communications." *Id.* at n.172.

"If the [Washington] Post published an article of mine defaming a private individual, the paper would be liable. However, if washingtonpost.com, the Post's on-line Internet site, were to carry the same article, it would not be similarly liable. Why? Because Section 230 of the Communications Decency Act of 1996 bars liability for interactive computer services providers exercising a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone, or alter content. The Act immunizes Internet providers from precisely the sort of liability on which plaintiffs rely to hold other publishers accountable.

How this paradox came about is an instructive tale; how to reconcile it with traditional notions of First Amendment freedom and responsibility is a pressing task." Pincus, "The Internet Paradox Libel, Slander & the First Amendment in Cyberspace," 2 Green Bag 2d 279 (1999).

"[T]his comment concludes that the Fourth Circuit wrongfully disregarded the legal distinction between publishers and Distributors of defamatory material, provided Internet Providers unfettered protection beyond the scope of section 230, and placed Internet Providers on a level of First Amendment protection that far exceeds the Congressional goal of encouraging ISPs to self regulate." Cordero, "*Damnum Absque Injuria: Zeran v. AOL* and Cyberspace Defamation Law," 9 Fordham Intell. Prop. Media & Ent. L.J. 775, 779 (1999).

"A lack of Congressional intent to immunize Distributor liability can also be inferred from Congressional purpose in enacting the Communications Decency Act, to encourage interactive computer services to eliminate offensive material from the Internet. In this regard, it is commonsensical for Congress to immunize interactive computer services from liability for defamation based on unsuccessful efforts to find offensive content on their systems. Congress desired to encourage interactive computer services to locate offensive content by removing the penalty in the form of Publisher status, for doing so. Yet, it is quite disingenuous for a Congress that wanted to encourage ISPs to find offensive material and remove it, to immunize such ISPs from liability that found offensive material but deliberately failed to remove it." *Id.* at 816-817.

"[In *Blumenthal v. Drudge*] the district court ruled, albeit reluctantly, that America Online was as free of civil liberty in the *Bluemnthal* case as it had been in *Zeran*. The court found section 230 a clear congressional intent to exempt Internet service providers—'[w]hether wisely or not'—from a broad range of potential tort claims. That conclusion followed despite a degree of editorial control that seemed to the court to make it 'only fair' to allowed defamed persons to proceed against the provider." O'Neil, "The *Drudge* Case: A Look at Issues in Cyberspace Defamation," 73 Wash. L. Rev. 623, 628-29 (1998).

"This Note explores how in the span of three years, the law shifted from allowing liability for ISPs even when they tried to screen offensive content, to barring liability for ISPs, even when they promoted such offensive content. Congress, in trying to encourage ISPs to monitor their own content, actually

Petitioner submits that the courts are not applying established principles of statutory and common law to liability issues involving "Internet" services and companies. Furthermore, the courts are basing what Petitioner believes to be erroneous decisions on findings of facts that are not technically accurate and are basing legal conclusions on misrepresentations and mis-understandings of the capabilities of the technology and the true nature of online business. This state of legal affairs has reached the point where this Court should step in to correct this latest error and help the lower courts to get back on the track of making accurate findings of true facts and precedentially consistent conclusions of constitutional and common law.

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removed all legal incentives for the ISPs to do so. At the same, the courts dramatically dismissed all traditional defamation principals in expanding the law's immunity provision father than necessary....The courts in turn should have been more cautious in expanding immunity under language that did not compel such an expansion and contrary to the statute's intent." Kane, "Electronic Commerce: Internet Service Provider Liability, *Blumenthal v. Drudge*," 14 Berkeley Tech. L.J. 483 (1999).

"Even if the ISP retains editorial control over the bulletin board and has knowledge of the defamatory statement, it cannot be held under either publisher or distributor liability. Pantazis, "*Zeran v. America Online, Inc.*: Insulating Internet Service Providers from Defamation Liability," 34 Wake Forest L. Rev. 531, 532 (1999).

"[C]ongress opted to immunize ISPs from liability for their failure to edit, withhold, or restrict access to offensive material that they distributed." *Id.*. at 552.

"Courts construing the CDA and the *Zeran* decision have come to identical conclusions even when given strikingly different fact scenarios....It is difficult to conceive that, by passing the CDA, Congress would immunize AOL from liability for failing to remove the very material that Congress sought to purge from the Internet. *Id.* at 554.

THE NEW YORK COURT OF APPEALS ERRED IN EXTENDING COMMON CARRIER IMMUNITIES TO A NON-CARRIER ONLINE SERVICE PROVIDER

The CDA's Good Samaritan provision did not grant unconditional-absolute immunity, but allowed for conditional-earned immunity if the statutory requirements are met. The state court below purported to extend to Prodigy, as an interactive computer service provider, a type of immunity heretofor reserved for common carriers, but granted a more absolute immunity than the qualified privilege applicable to such carriers.

The immunity due a telephone or telegraph company is one based on its status as a common carrier that affects interstate or foreign commerce to the extent that Congress has chosen to regulate it for the public good under the Commerce Clause. Congress enacted the Communications Act of 1934 and established the Federal Communications Commission to regulate the Nation's communications carriers. The unearned and unconditional extension of carrier immunity by the New York courts is in direct contravention to and conflicts with the CDA's express amendments to the Communications Act that interactive computer services, such as online service providers like Prodigy, are not and shall not be treated as common carriers. As a result, these non-carriers are not subject to the "must carry" and public obligation functions that government imposes on common carriers to insure open access to interstate and foreign trade and commerce. Since these "Internet" related companies would be free of federal and state regulation, the medium and the industry would flourish—as Congress recognized in the Findings and Policy accompanying the "Good Samaritan" protections. *See* 47 U.S.C. § 230 (a) and (b). The type of immunity protections Congress intended for such non-

carrier Internet services was provided in the "Good Samaritan" elements of § 230 (c), no more and no less.

This Court should find that the Supremacy and Commerce clauses prohibit the states from reversing that clearly expressed federal Internet policy. New York's judicial grant of an absolute immunity actually perpetuates and encourages the very abuse of non-feasance that *Stratton Oakmont* spawned and that Congress intended to correct in the CDA.

Petitioner submits that traditional rules of publisher/distributor liability suffice to protect the medium and the First Amendment interests, as noted in *Cubby, supra*, 776 F.Supp. at 139. The CDA's "TREATMENT OF PUBLISHER OR SPEAKER" provision, § 230 (c)(1), if applied correctly, is also sufficient protection for providers and users without expanding § 230 to give a blanket immunity which overshadows its conditional elements.

The federal and state courts should apply traditional rules of corporate liability to determine if publisher or distributor liability may be proven under the circumstances. The courts should also apply the CDA, both § 230 (c)(1) to see if liability is warranted even if not treated as "publisher or speaker" and (c)(2) to see if an interactive computer service ("ICS") engaged in "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene...or otherwise objectionable..." and, if so, to apply the Good Samaritan immunity so the ICS is not "held liable on account of" such public interest acts.

Although the Petitioner argued that the Good Samaritan provision of the CDA was inapplicable to his claims because both the acts (1993-94) and the filing of the suit (1994) predated the passage of the CDA (1996), the New York courts were in error in finding their adoption of carrier immunity to be consistent with the CDA (as the Appellate Division held) or that the CDA was irrelevant to

the application of the carrier immunity (as the Court of Appeals held). Even though Petitioner could still be correct that his claims should be decided on publisher/distributor liability principles without reference to the CDA's later Good Samaritan provisions,[11] the state courts below were wrong to ignore the CDA's pronouncements on the non-carrier status of computer service providers and should then have considered the scope of "Good Samaritan" immunity that Congress intended for such non-carrier interactive computer services under the Commerce Clause, which should, in turn, bind the states under the Supremacy Clause. The relevance of the non-carrier treatment for ICSs in the CDA is totally consistent with Petitioner's argument that the CDA's immunity provisions do not govern his liability claims against such a non-carrier. However, the state courts' treatment of non-carrier Prodigy as if it were a telephone carrier, for liability purposes, and then extending a much broader type of carrier immunity than the CDA intended for such non-carrier services, is not consistent with the enactments of Congress and should be reversed as in conflict with the Supremacy, Commerce, Obligation of Contracts, Due Process, and Equal Protection clauses.

New York's courts have altered the rules of liability within that State to the extent of nullifying all the elements of civil liability that Congress established under the Commerce Clause for non-carrier ICSs. The court below granted a favored status to online services in conflict with the status defined for interstate commerce purposes by the Congress. Petitioner submits that this treatment of non-carrier Prodigy as equal to or more protected than a true common carrier and the state court's grant of immunity beyond the scope of the CDA are unconstitutional

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[11] The retroactivity/restrospectivity of the CDA to suits filed prior to the February, 1996, effective date of the CDA was not reached in *Zeran, supra*, 129 F.3d at 334-35, which held only that the CDA applied to suits filed after February 8, 1996.

encroachments on the interstate commerce power of Congress and are barred by the Supremacy Clause.

Petitioner also submits that this issue is viable, despite the declaration of the New York Court of Appeals that it was not ruling on the scope of CDA's "Good Samaritan" immunity, 94 N.Y.2d 242, Slip Op. at 10 (App. 9-10). The Appellate Division specifically ruled on this issue by stating that its decision was in "complete harmony" with the CDA, 250 A.D.2d at 238 (App. 25).[12] Both courts below incorrectly characterized their opinions.

The Court of Appeals' ruling is based solely on treating a non-carrier as if it were a telephone or telegraph carrier-a decision directly contrary to the Congressional mandate that nothing in the CDA (47 U.S.C. § 223) "shall be construed to treat interactive computer services as common carriers or telecommunications carriers." This is not a matter of state law, it is a matter of interstate commerce. The immunity the state court purported to grant was reserved for regulated carriers, so the conflict with the Commerce Clause cannot be avoided.[13]

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[12] One commentator contested this statement by noting "the rationales the court uses to reach that outcome are incompatible with analysis under section 230 and traditional libel law. ... Thus, 'the outcome in this case' is *not* 'in complete harmony with ... the Communications Decency Act." Fried, "Dodging the Communications Decency Act when Analyzing Libel Liability of On-line Services: *Lunney v. Prodigy* Treats Service Provider like Common Carrier," 1 COLUM. SCI. & TECH. L. REV. 1 (1999) (http://www.stlr.org/cite.cgi?volume=1&article=1) at ¶ 71-72.

[13] The state court's opinion also raises Supremacy and Equal Protection issues for federal courts in federal diversity suits, especially for the district courts within New York, since the federal courts should apply the CDA as intended by Congress (not as interpreted in *Zeran* or *Blumenthal, supra*) and should not be bound by the New York Court of Appeals on liability issues under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

THE NEW YORK COURT OF APPEALS OPINION CREATES A DENIAL OF EQUAL PROTECTION FOR PETITIONER AND ALL OTHERS WHO ARE INJURED BY A NON-CARRIER TORTFEASOR GRANTED GREATER IMMUNITY BY THE NEW YORK COURTS THAN FEDERAL LAW ALLOWS

The decision below denies Equal Protection to this private Plaintiff-Respondent, as well as to other private persons who are injured or aggrieved by an immune non-carrier, as opposed to those who suffer at the hands of a regulated carrier.

If a true carrier had injured Petitioner, then he would have two potential remedies. He could petition the FCC or N.Y. Public Service Commission for sanctions or to improve their regulations to prevent such injuries to himself and others in the future all across the Country. He could also exercise his Due Process right to sue in court and offer proof that the carrier violated the publisher or distributor liability elements and overcome the qualified carrier privilege by showing, if he could, sufficient knowledge and malice. The New York Court of Appeals below did not recite the elements of the privilege it purported to apply, but adopted the analysis of the Appellate Division which described the elements of recovery against a carrier, 250 A.D.2d at 236 (App. 21): "The common law has always recognized a qualified privilege for telegraph companies that transmit defamatory messages submitted by their customers pursuant to which the defendant can be held liable only upon a showing of actual malice, that is, knowledge of the falsity of the message, a showing which a plaintiff will rarely if ever be able to make.... In *Anderson*, the Court extended that privilege to the telephone company as well." The courts below concluded that Prodigy was not a publisher of any of the statements, even those it wrote claiming Petitioner was a "delinquent debtor" and credit card fraud, and held that

Prodigy would not be liable even if the material were defamatory. The New York courts implied an absolute privilege for an online service against any wrongdoing by a third party, without opportunity to prove knowledge or malice on the part of the service (similar to the scope of immunity mis-read into the CDA in the *Zeran* cases).

The Court of Appeals of New York said it was applying the carrier privilege, but instead dismissed the action without adjudication of contested facts in the trial court. Because Petitioner was subjected to an erroneous expansion of the carrier immunity on behalf of a non-carrier that was not entitled to such carrier privilege under the Commerce Clause, Petitioner suffered a denial of his Due Process right to trial and his Equal Protection right to have the state court treat the parties in a non-discriminatory fashion without special, unearned status for such an online tortfeasor. The special treatment accorded OSP/ISP defendants under the New York rule can also be characterized as interfering with Obligation of Contracts.

When a litigant is faced with meeting the carrier privilege, the theory is that the public trades some individual protections for the public protections that result from the regulations that governments impose on carriers. Since the CDA prohibits Prodigy from being treated or regulated as a carrier, and it is now absolved from any liability for wrongdoing that others may inflict even with its participation or knowledge, then Prodigy has received special status above the law to the detriment of Petitioner. The effect of the New York Court of Appeals opinion is to immunize an entire private, non-regulated industry of businesses that answer neither to government nor courts.

The minor Plaintiff who is Petitioner before this Court was stripped of his right of recourse to the courts by the state court below and he has no recourse to the Government to petition Congress or a federal agency to institute regulations to prevent similar injuries to others.

Had he been injured by a true regulated carrier, such as a telephone or telegraph company, the rules for his recovery in court are well established and he could meet them or not. In any event, he would still be protected by the effect of the laws and regulations that govern such carriers, as are all members of the public, and he could still petition for redress of any specific grievances and Congress or the FCC could respond in law if they agreed that such grievances need correction by further law or regulation.

The federal question that should be decided by this Court is that no state court can deprive citizens such as Petitioner of their right to access the courts to seek remedies for individual injuries suffered at the hands of a private company by granting such private business civil immunity reserved for regulated common carriers because to do so deprives the Petitioner of his right to Equal Protection of the law under the Fourteenth Amendment.

By granting a more favorable version of carrier immunity to a non-carrier, the state's court of last resort has created special treatment for a private industry that is unprecedented in American history and in conflict with several principles of Constitutional government; that no one is beyond the reach of the law, that the Supremacy Clause prevents the states from pre-empting the federal Government in matters of interstate commerce, and that citizens have Fifth Amendment rights to Due Process and Fourteenth Amendment rights to Equal Protection.

The decisions of the courts below also conflict with the CDA itself, despite the courts' denials. Under the CDA, Prodigy would have a conditional, earned immunity for any "Good Samaritan" actions it may have taken to protect the public. The CDA did not grant common carrier privileges, but a form of Internet computer service immunity for non-carriers. In the aftermath of the New York decisions below, Prodigy enjoys both the available immunity offered by CDA and the more extensive ISP

immunity granted below. However, Prodigy has no obligation to do anything in exchange for this double immunity. It need not comply with regulations for the public good as other carriers do nor does it have to act as a Good Samaritan to get CDA immunity (as *Zeran* held). Even if *Zeran* was not followed in the federal or state courts in New York, Prodigy can ignore it and act with impunity under the grant of super-carrier immunity it won in its appeal in the New York Court of Appeals.

The decision below was not just wrong; it is dangerous. It is also not a case that should be left to case-by-case adjudication or development by the other federal and state courts. The state court below granted a new rule of OSP/ISP immunity, with no obligation to comply with the CDA's Good Samaritan conditions. The rule applies to any Internet connected service company even though it is not a true common carrier or telecommunications carrier. The federal CDA immunity, on the other hand, is a provision that requires case-by-case application under the totality of the circumstances and the specific facts of the cases in which it is sought to be granted. The court below's dismissal of the action, before the trial court made its findings of fact as to the conduct and circumstances that could involve or absolve liability, is undeniable precedent that such lawsuits will be dismissed from the New York courts without adjudication, simply because the case is filed against an "Internet" computer service. This is so, even if there are allegations beyond mere carriage of another's speech and heedless disregard after receiving direct notice, or when there are independent acts taken by the company itself against a plaintiff that could be independently actionable.

Furthermore, the court below put virtually no limit on how much of the "Internet" industry its online immunity would extend to. The parameters of the court's immunity are not stated in the opinion and are not bounded by any

guidelines. If immunity is granted to non-carriers just because they provide services on the Internet, then which services or companies are entitled to have civil suits dismissed against them in New York? Do the local and long distance phone carriers get automatic dismissal? Do companies that supply hardware, wires, routers, servers, or computers for phone or Internet traffic get immunity? Is New York's "Prodigy" immunity only for OSPs, like Prodigy, America Online, CompuServe, Microsoft Network, Earthlink, etc., and, if so, is it for local or just national OSPs? Does it apply to pure ISPs, browsers, search engines, portals, commercial and private listserves, BBS, Usenet operators, commercial Websites, private Websites? Any company that has email as one of its services or functions? The reasons given by the opinions below could provide support for any or all of these Internet related entities to claim the new privilege. Petitioner submits that the opinion below will undoubtedly be applied to any and all companies that have one of the broad categories of characteristics of an interactive computer service as defined by federal law in 47 U.S.C. § 230 (e)(2): "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

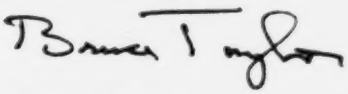
CONCLUSION

Congress freed the Internet/Online service providers of carrier regulations and then offered them immunity if they take good faith measures to restrict access to offensive materials. The Telecommunications Act set a standard against treating interactive computer services as carriers

and set another standard as to what type of conditional privilege those non-carriers could earn. Neither the Policy nor the "Protection for 'Good Samaritan' Blocking..." provisions of § 230 express or imply any intent to allow the Internet and Interactive Computer Service companies and operators to be beyond the reach of the law, whether regulatory, statutory, or common law. The CDA cannot be read as intending to allow online users or providers to be immune from the reach of the courts of law.

The decision of the Court of Appeals of New York violated the Commerce, Contracts, and Supremacy clauses of the Constitution, as well as Petitioner's Fifth and Fourteenth Amendment rights. For these reasons, Petitioner prays that the writ be granted.

Respectfully submitted,



Bruce A. Taylor
Counsel of Record
(703) 691-4626, Fax: -4669

J. Robert Lunney
Lunney & Murtagh, LLC
(914) 686-1776, Fax: -1785
Of Counsel

Robin S. Whitehead
Morality in Media, Inc.
(212) 870-3216, Fax: -2765
Of Counsel

APPENDIX

Opinion, N.Y. Court of Appeals 1

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[1999 Slip Op. 10292
94 N.Y.2d 242
28 Media L. Rep. 1090
1999 WL 1082126]

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Alexander G. LUNNEY, Appellant,
v.
PRODIGY SERVICES COMPANY, Respondent, et al., Defendants.

No. 164.

Court of Appeals of New York.

Argued Oct. 13, 1999.

Decided Dec. 2, 1999.

Minor sued Internet service provider (ISP) for defamation and negligence after imposter who had opened accounts using minor's name posted vulgar messages to electronic bulletin board and sent threatening, profane e-mail message. The Supreme Court, Westchester County, Joan B. Lefkowitz, J., denied ISP's motion for summary judgment. ISP appealed, and the Supreme Court, Appellate Division, 250 A.D.2d 230, 683 N.Y.S.2d 557, reversed. Granting leave to appeal, the Court of Appeals, Rosenblatt, J., held that: (1) ISP was protected by qualified privilege; (2) ISP was not the "publisher," for defamation purposes, of e-mail and electronic bulletin board messages in question; and (3) ISP was not negligent in failing to prevent imposter from opening account using plaintiff's name.

Order of Appellate Division affirmed.

Thomas V. Marino, New York City, and Lunney & Murtagh, L.L.C., White Plains (J. Robert Lunney of counsel), for appellant.

Phillips Nizer Benjamin Krim & Ballon, L.L.P., New York City (Michael J. Silverberg and Bruce J. Turkle of counsel), for respondent.

Bruce A. Taylor, Fairfax, Virginia, Paul J. McGeady, New York City, and Robin S. Whitehead for National Law Center for Children and Families and another, amici curiae.

OPINION OF THE COURT

ROSENBLATT, J.

*1 [1-3] Usurping the name of Alexander Lunney (a teenage Boy Scout and infant plaintiff in this appeal), an unknown imposter opened a number of accounts with Prodigy Services Company (Prodigy), an Internet Service Provider (ISP). The imposter posted two vulgar messages in Lunney's name on a Prodigy bulletin board and sent a threatening, profane electronic mail (e-mail) message in Lunney's name to a third person. Lunney, by his father, has sued Prodigy, asserting that he has been stigmatized by being falsely cast as the author of these messages. [FN1] The principal issues before us are whether, under these circumstances, Prodigy may be held liable for defamation or negligence. For the reasons that follow, we hold that the complaint against Prodigy was properly dismissed.

I. Background

On September 9, 1994, after opening several membership accounts with Prodigy under slightly different variants of the name

Alex or Alexander Lunney, the imposter transmitted an e-mail message, under Lunney's name, to a local scoutmaster. The subject line of the message read "HOW I'M GONNA'KILL U"; the body was vulgar in the extreme. After receiving the e-mail, the scoutmaster alerted the Bronxville police, as well as Lunney's scoutmaster. They investigated the matter, and readily accepted Lunney's denial of authorship, and his innocence in this episode.

While the investigation was afoot, Prodigy, by letter dated September 14, 1994, notified Lunney that it was terminating one of the named accounts "due to the transmission of obscene, abusive, threatening, and sexually explicit material through the Prodigy service and providing inaccurate profile information." Lunney, for his part, advised Prodigy that it was an imposter who, without authority, had opened the account and sent the message. Prodigy apologized to Lunney and also informed him that it had uncovered four more Alexander Lunney accounts and closed them all within two days after they were opened.

Lunney sued Prodigy, claiming, in essence, that Prodigy was derelict in allowing the accounts to be opened in his name, and was responsible for his having been stigmatized and defamed. During discovery Prodigy located and produced two additional vulgar messages that appeared on its electronic bulletin board with Alexander Lunney's name as sender dated September 5, 1994 and September 7, 1994. Prodigy also produced two internal memoranda pertaining to Prodigy's initial reasons for terminating the "Alexander Lunney" accounts before learning that they had been opened by an unauthorized imposter. [FN2]

Supreme Court denied Prodigy's three motions for summary judgment. On a consolidated appeal from the denial of the second and third motions, the Appellate Division reversed and granted summary judgment to Prodigy, holding that (i) the messages were not "of and concerning" Lunney and therefore did not defame him, (ii) although the messages were in extremely poor taste, the stigma associated with them did not amount to defamation and (iii) Prodigy was not the publisher of the messages, but even if it could be so considered, it was entitled to a qualified privilege sheltering it from liability (see, Lunney v. Prodigy Servs. Co., 250 A.D.2d 230, 233, 683 N.Y.S.2d 557). We granted Lunney leave to appeal to this Court.

II. Analysis

*2 As a threshold matter there is the question of whether the messages were defamatory. The Appellate Division expressed doubt on the point, considering that defamation cases most typically involve communications that directly impugn the plaintiff. Here, the messages were not about the plaintiff, but were ascribed to him. In Ben-Oliel v. Press Publ. Co., 251 N.Y. 250, 167 N.E. 432, this Court held that a scholar stated a cause of action for libel based on the publication of a flawed article written by someone else, but improperly attributed to her (see also, Clevenger v. Baker Voorhis & Co., 8 N.Y.2d 187, 203 N.Y.S.2d 812, 168 N.E.2d 643). For purposes of this opinion we will assume that although he was not directly attacked, Lunney was defamed by being portrayed as the author of the foul material.

[1] [1] In a thoughtful opinion by Justice Bracken, the Appellate Division went on to

hold that even if the material was "defamatory" Prodigy is protected by the common-law privilege recognized in Anderson v. New York Tel. Co., 35 N.Y.2d 746, 361 N.Y.S.2d 913, 320 N.E.2d 647. We agree with the Appellate Division's analysis and conclude that in the case before us the common-law privilege should apply.

The E-Mail Message

We turn first to Lunney's claim stemming from the e-mail message. E-mail is the day's evolutionary hybrid of traditional telephone line communications and regular postal service mail. [FN3] As one commentator explained, "[t]o transmit a message, one must have access to an on-line service's e-mail system and must know the recipient's personal e-mail address" (see, Luftman Note, Defamation Liability for On-Line Services: The Sky is Not Falling, 65 Geo Wash L Rev 1071, 1081 [1997]). Once this is accomplished, a person may communicate by composing a message in the e-mail computer system and dispatching it telephonically (or through some other dedicated electronic line) to one or more recipients' electronic mailboxes. A recipient may forward the message or reply in like manner. Commercial on-line services, such as Prodigy, transmit the private e- mail messages but do not exercise any editorial control over them (see, Luftman, op. cit.).

Because Lunney's defamation action is grounded in New York common law, we evaluate it in accordance with our established tort principles (see, Foster v. Churchill, 87 N.Y.2d 744, 751-752, 642 N.Y.S.2d 583, 665 N.E.2d 153; Liberman v. Gelstein, 80 N.Y.2d 429, 434, 590 N.Y.S.2d 857, 605 N.E.2d 344). Although they were fashioned long before the advent of e-mail,

these settled doctrines accommodate the technology comfortably, and with apt analogies (see generally, Miranda, Defamation in Cyberspace: Stratton Oakmont, Inc. v Prodigy Services Co., 5 Alb L J Sci & Tech 229,237 [1996]).

In Anderson v. New York Tel. Co., this Court was asked to determine whether a telephone company could be held liable as a publisher of a scurrilous message that a third party recorded and made available to the public by inviting anyone interested to dial in and listen (35 N.Y.2d 746, 361 N.Y.S.2d 913, 320 N.E.2d 647, supra). The Court adopted the opinion of Justice Witmer in his dissent at the Appellate Division, concluding that the telephone company could not be considered a publisher, because in "no sense has * * * [it] participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility" (42 A.D.2d 151, 163, 345 N.Y.S.2d 740). Anderson also holds that even if the telephone company could be counted as a publisher, it would be entitled to a qualified privilege subject to the common-law exception for malice or bad faith (42 A.D.2d, at 163-164, 345 N.Y.S.2d 740).

*3 [2] Anderson emphasized the distinction between a telegraph company (in which publication may be said to have occurred through the direct participation of agents) and a telephone company, which, as far as content is concerned, plays only a passive role. The Anderson doctrine parallels the case before us. Prodigy's role in transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations. In this respect, an ISP, like a telephone company,

is merely a conduit. Thus, we conclude that under the decisional law of this State, Prodigy was not a publisher of the e-mail transmitted through its system by a third party.

Moreover, we are unwilling to deny Prodigy the common-law qualified privilege accorded to telephone and telegraph companies. The public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation. Considering that in the case before us there is no basis upon which to defeat the qualified privilege, it should and does apply here.

The Prodigy Bulletin Board Messages

As distinguished from e-mail communication, there are more complicated legal questions associated with electronic bulletin board messages, owing to the generally greater level of cognizance that their operators can have over them. One commentator defines an electronic bulletin board as "storage media, e.g., computer memories or hard disks, connected to telephone lines via devices known as modems and controlled by a computer" (see, Segal, Comment, Dissemination of Digitized Music on the Internet: A Challenge to the Copyright Act, 12 Santa Clara Computer & High Tech L J 97, 103, n 21 [1996]). In some instances, an electronic bulletin board could be made to resemble a newspaper's editorial page; in others it may function more like a "chat room." [FN4] In many respects, an ISP bulletin board may serve much the same purpose as its ancestral version, but uses electronics in place of plywood and thumbtacks. Some electronic bulletin boards post messages instantly and automatically, others briefly delay posting so as not to become "chat

rooms," while still others significantly delay posting to allow their operators an opportunity to edit the message or refuse posting altogether (see, Sheridan, Zeran v AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet, 61 Alb L Rev 147, 152-153 [1997]).

Lunney argues that because Prodigy, in its membership agreements, reserves for itself broad editorial discretion to screen its bulletin board messages, it should be liable as a publisher of such messages. Prodigy, on the other hand, argues that while it reserves the right to screen its bulletin board messages, it is not required to do so, does not normally do so and therefore cannot be a publisher of electronic bulletin board messages posted on its system by third parties.

*4 [3] [2] The Appellate Division aptly concluded that even if Prodigy "exercised the power to exclude certain vulgarities from the text of certain [bulletin board] messages," this would not alter its passive character in "the millions of other messages in whose transmission it did not participate" (250 A.D.2d, at 237, 683 N.Y.S.2d 557), nor would this, in our opinion, compel it to guarantee the content of those myriad messages. We agree with the Appellate Division in its conclusion that, in this case, Prodigy was not a publisher of the electronic bulletin board messages. We see no occasion to hypothesize whether there may be other instances in which the role of an electronic bulletin board operator would qualify it as a publisher.

III. Other Issues
Negligence

[4] [3] Lunney contends that Prodigy was negligent in failing to employ safeguards to prevent the imposter from opening the accounts in question. He would require an ISP to employ a "process for verification of the bona fides" of all applicants and any credit cards they offer so as to protect against defamatory acts. Prodigy contends that such a duty would require an ISP to perform investigations on millions of potential subscribers, so as to be guarantors against harmful transmissions. The rule plaintiff advocates would, in cases such as this, open an ISP to liability for the wrongful acts of countless potential tortfeasors committed against countless potential victims. There is no justification for such a limitless field of liability (Pulka v. Edelman, 40 N.Y.2d 781, 390 N.Y.S.2d 393, 358 N.E.2d 1019). If circumstances could be imagined in which an ISP would be liable for consequences that flow from the opening of false accounts, they do not present themselves here.

Communications Decency Act

The parties have disagreed over the applicability of the Communications Decency Act (47 USC § 230) (CDA) and the merits of Zeran v. America Online, 129 F.3d 327 [4th Cir.1997], cert denied 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed.2d 712. Prodigy has contended that the CDA should govern this case by retroactive application. It asks us to interpret the CDA to render an ISP unconditionally free from notice-based liability, insofar as the statute has been interpreted as granting Federal immunity from "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter

content" (see, Zeran v. America Online, 129 F.3d, at 330, supra). At this point we decline the invitation to come down on either side of this debate. [FN5] This case does not call for it.

We recognize of course that parties to a lawsuit, and surely others interested in the field, will look to decisions for points of guidance. For every new rule that a court sets down doubts are minimized, and practitioners are able to give counsel based on settled doctrine, rather than on open questions. While many decisions serve to establish rules that advance predictability, courts cannot go beyond the issues necessary to decide the case at hand. An ambition of that sort would entail something very much like drafting advisory opinions. Misdirected or misapplied, they can create the very kind of uncertainty, or confusion, that purposeful decisional law seeks to eliminate. These general observations apply even more compellingly when dealing with Internet law. Given the extraordinarily rapid growth of this technology and its developments, it is plainly unwise to lurch prematurely into emerging issues, given a record that does not at all lend itself to their determination.

*5 We have considered Lunney's remaining causes of action against Prodigy and find them to be without merit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges SMITH, LEVINE, CIPARICK and WESLEY concur; Judge BELLACOSA taking no part.

Order affirmed, with costs.

FN1. Because this suit was commenced when Alexander Lunney was a minor, the action was brought in his name, by his father, J. Robert Lunney. Unless otherwise stated, "Lunney" refers to Alexander Lunney. Initially, Lunney named "John Doe," the unknown imposter, as a co-defendant, but that claim has been abandoned, and the case has proceeded only against Prodigy.

FN2. Lunney sought and was granted permission to amend his complaint to add claims against Prodigy based on the Prodigy bulletin board messages and the internal memoranda.

FN3. Now known colloquially as "snail mail" judging by its comparative speed (see, e.g., Salbu, Who Should Govern the Internet?: Monitoring and Supporting a New Frontier, 11 Harv J Law & Tech 429, 471-472 [1998]).

FN4. "Chat rooms" have been defined as services that allow multiple users "to 'talk' through simultaneous text postings" (see, Barrett, Note, The Law of Diminishing Privacy Rights: Encryption Escrow and the Dilution of Associational Freedoms in Cyberspace, 15 NYL Sch J Hum Rts 115, 117, n 14 [1998]).

FN5. E.g., Cordero, Comment, Damnum Absque Injuria: Zeran v AOL and Cyberspace Defamation Law, 9 Fordham Intell Prop, Media & Ent L J 775 (1999); Pantazis, Note, Zeran v America Online, Inc.: Insulating Internet Service Providers From Defamation Liability, 34 Wake Forest L Rev 531 (1999); Wiener, Comment, Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?, 39 Santa Clara L Rev 905 (1999); Boehm, Note, A Brave New World of Free Speech: Should Interactive Computer Service

Providers Be Held Liable for the Material They Disseminate?, 5 Rich JL & Tech 7 (1998); Note, Slitt, The Anonymous Publisher: Defamation on the Internet After Reno v Amercian Civil Liberties Union and Zeran v America Online, 31 Conn L Rev 389 (1998); Sheridan, Zeran v AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet, 61 Alb L Rev 147 (1997).

END OF DOCUMENT

[250 A.D.2d 230
683 N.Y.S.2d 557]

Alexander G. Lunney, Respondent,
v.
Prodigy Services Company, Appellant, et al., Defendants.

Supreme Court, Appellate Division, Second Department, New York

December 28, 1998

SUMMARY

Appeal from (1) an order of the Supreme Court (Joan B. Lefkowitz, J.), entered July 2, 1997, in Westchester County, which, in an action, inter alia, to recover damages for libel and the intentional infliction of emotional distress, denied defendant-appellant's motion for summary judgment dismissing the complaint insofar as asserted against it, without prejudice to renewal, and granted the plaintiff's cross motion for leave to serve an amended complaint, and (2) an order of the same court, entered January 14, 1998, which denied defendant-appellant's renewed motion for summary judgment dismissing the amended complaint insofar as asserted against it.

APPEARANCES OF COUNSEL

Phillips Nizer Benjamin Krim & Ballon, L.L.P., New York City (Michael J. Silverberg and Bruce J. Turkle of counsel), for appellant.

Lunney & Murtagh, L.L.C., White Plains (J. Robert Lunney and Phillip C. Landrigan of counsel), for respondent.

OPINION OF THE COURT

Bracken, J. P.

Some infantile practical joker with access to a computer sent an offensive electronic message (hereinafter e-mail) to a Boy Scout leader, infusing the text of the message with threats more likely to perplex than actually to intimidate an adult recipient. The intended victim of this prank appears to be less the Boy Scout leader himself than the plaintiff, Alex G. Lunney, who was then a 15-year-old prospective Eagle Scout, and whose name appeared as the signatory and author of the e-mail message in question. The charade was, as they say, crude but effective, in that the plaintiff was initially suspected of having sent the threatening piece of electronic correspondence. The plaintiff now seeks money damages as compensation for the emotional distress which he consequently suffered, not from the originator of this lowbrow practical joke, but instead from Prodigy Services Company (hereinafter Prodigy), the company which in effect furnished the medium through which the offensive message was sent. Applying a privilege recognized by the common law of this State, and historically afforded to telegraph companies (see, Anderson v New York Tel. Co., 35 NY2d 746, revg 42 AD2d 151 on dissent of Witmer, J.), we conclude that Prodigy is entitled to summary judgment.

I

According to the plaintiff's original complaint, on September 9, 1994, defendant "John Doe I", using identification number *232 EGYD83A, accessed the "Prodigy

Network" and posted a "vile and obscene" e-mail message in the name of the plaintiff.

The Boy Scout leader who received the e-mail reported the matter to the Bronxville police and to the plaintiff's Scout Master. The latter"confronted [the] plaintiff, at his home, in the presence of his mother ... and demanded an explanation". There is no evidence that the police took any action against the plaintiff, or that he was disciplined in any way by the Boy Scout authorities. It therefore appears that the plaintiff's denial of any involvement in the transmission of this message was accepted at face value.

By letter dated September 14, 1994, a Prodigy representative wrote to the plaintiff advising him that his account had been suspended due to the transmission of "abusive, obscene, and sexually explicit material" for which he was, as of that time, incorrectly presumed to be responsible. In a letter dated September 23, 1994, the plaintiff responded by explaining that he had in fact never subscribed to Prodigy's service, and that anyone who had purported to open an account in his name had done so fraudulently. In a letter dated October 27, 1994, a representative of Prodigy apologized to the plaintiff, and advised him that several fictitious accounts, which had been opened under his name, had been terminated. It appears, in fact, that a Prodigy account can be opened by any person who is willing to represent that he or she is not a minor, and who is in a position to furnish a name, an address, and (at least since October 1994) a valid credit card number for billing.

In his original complaint dated December 22, 1994, the plaintiff demanded

compensatory and punitive damages from Prodigy based on three theories: (1) libel per se, (2) negligence, and (3) harassment. The plaintiff also sought to enjoin Prodigy from circulating derogatory or defamatory statements about him. Prodigy served an answer dated February 13, 1995. The plaintiff later sought and obtained leave to serve an amended complaint.

In his amended complaint, the plaintiff expanded his factual allegations in order to encompass two "bulletin board" messages posted with the help of Prodigy's service, dated September 5, 1994 and September 7, 1994, respectively.

The plaintiff also sought to impose liability on Prodigy based on a statement by one of its agents, made in an electronic bookkeeping entry, to the effect that "Alex Lunney ... is a non-pay disconnect subscriber 143 days delinquent". Similarly, the amended complaint cites a handwritten memo produced by a *233 Prodigy subcontractor stating, "Alex Lunney has been terminated for cc [credit card] fraud as well as obscene material". The plaintiff claims that these messages were still being transmitted over Prodigy's network, "even months after this action was commenced". The amended complaint includes one cause of action based on libel, one based on negligence, and one based on "harassment/intentional infliction of emotional distress".

For procedural reasons which need not be addressed, Prodigy was allowed to make three successive motions for summary judgment, none of which was addressed on the merits. Prodigy now appeals from the two orders which denied the last two of these motions.

II

The first and most obvious observation that must be made is that, aside from the two memoranda circulated within Prodigy, the statements complained of by the plaintiff do not immediately appear to be defamatory. We are in full agreement with the argument of the appellant's counsel that the e-mail and the bulletin board messages referred to above, although they purport to have been written by the plaintiff, are clearly not "of or concerning" the plaintiff. As counsel argues, these messages might indirectly lead a reader to conclude that the respondent is a "foul-mouthed teenager". At most, one could read into the e-mail message in question a statement of fact to the effect that the plaintiff is a bully who has threatened to sodomize a Scout leader's sons. Assuming that such a statement would indeed be defamatory, we conclude that Prodigy cannot be held legally responsible for it, nor for the allegedly defamatory bulletin board postings, because (1) Prodigy did not publish the statement, and (2) even if Prodigy could be considered a publisher of the statement, a qualified privilege protects it from any liability given the absence of proof that Prodigy knew such a statement would be false.

The rule of common law, as it originally developed in New York, was that, "[h]e who furnishes the means of convenient circulation, knowing, or having reasonable cause to believe, that it is to be used for that purpose, if it is in fact so used, is guilty of aiding in the publication and becomes the instrument of the libeler" (Youmans v Smith, 153 NY 214, 218-219). Taken to its extreme, this rule would render Xerox Corporation liable for the damages caused by the reproduction of a

libelous document on one of its leased machines, or International Business *234 Machines Corporation liable for the damages caused by the composition of a libelous document on one of its leased typewriters, at least if such corporate defendants had "cause to believe" that such libelous activities might occur. Subsequent authority makes it clear beyond dispute, however, that no potential for such liability exists, unless the defendant in question has some "editorial or at least participatory function" in connection with the dissemination of the defamatory material (Anderson v New York Tel. Co., 35 NY2d 746, 750, supra [Gabrielli, J., concurring]). Here, the record establishes to our satisfaction that Prodigy had no participatory function in connection with the dissemination of the offensive e-mail and bulletin board postings under review.

The key case on this point, Anderson v New York Tel. Co. (35 NY2d 746, supra), was decided well before the advent of personal computers. However, the legal analysis adopted by the Court of Appeals in that case is as persuasive in the case of written text sent over telephone lines, which is the essential nature of "e-mail" and bulletin board postings, as it was in the case of spoken or recorded messages sent over telephone lines, which is the type of communication the Anderson case involved.

The case of Anderson v New York Tel. (supra) involved the lessee of telephone equipment which enabled him to play, to whomever happened to call either of two telephone numbers, a recorded message containing accusations of misconduct against the plaintiff, the Presiding Bishop of the Church of God in Christ of Western New York. The lessee also had access to a

weekly radio program, which he exploited in order to encourage the public to call the two phone numbers containing the scurrilous message. The accusations against the Bishop included allegations that he fathered illegitimate children. The Bishop, understandably upset, sued the telephone company. The Court of Appeals, adopting the opinion of the dissenter in the Appellate Division, held that the Bishop had no cause of action.

The similarity between the fact pattern now under review and that under review in Anderson is evident; however, there is a major distinction which serves only to highlight the lack of merit with respect to the case at hand. In Anderson, the defendant telephone company had actually been notified of the improper use to which its equipment was being put. In fact, company employees dialed the numbers and actually listened to the defamatory messages. Nevertheless, the telephone company did nothing to stop the messages, despite the Bishop's repeated requests.*235

In Anderson, the dissenting opinion of Justice Witmer, adopted by the Court of Appeals, initially drew a distinction between telegraph companies, which may be considered to have published the messages submitted to them by telegraph senders, on the one hand, and telephone companies, which may not properly be considered publishers, on the other. As stated in Justice Witmer's opinion, a telegram is sent only "through the direct participation of agents of the telegraph company" whereas, "[i]n the case of a modern-day telephone call ... the caller communicates directly with the listener over the facilities of the telephone company, with no publication by the company itself" (Anderson v New York Tel. Co., 42 AD2d,

supra, at 163 [emphasis in original]). The evidence in the present record leads to the conclusion that the role played by Prodigy in connection with the offensive messages sent under the plaintiff's name is, by far, more analogous to that of a telephone company than to that of a telegraph company. Thus, pursuant to the first holding of the Court of Appeals in Anderson, we conclude that Prodigy cannot be considered a publisher.

It may be true that Prodigy has devised a method by which certain epithets are automatically excluded from the messages sent via its network. But application of any unintelligent automated word-exclusion program of this type cannot be equated with editorial control. A highly offensive message can be composed in the most impeccable prose, just as the words often thought of as offensive can be used affectionately or humorously in certain contexts. Intelligent editorial control involves the use of judgment, and no computer program has such a capacity. There is certainly no evidence in this record that a human being in the employ of the defendant approved of the transmission of the e-mail or bulletin board messages complained of by the plaintiff. This being the case, Prodigy cannot be considered a publisher of that material.

The Anderson case is also authority for the proposition that even if Prodigy could be considered a publisher, it is protected by a qualified privilege. Anderson observes that the telephone company is in a purely passive position with respect to the messages sent by one telephone user to another, a position "not legally different from the role played by a person who leases a sound amplification system to a person who makes a defamatory public speech, or

who leases a typewriter to one who writes defamatory messages" (Anderson v New York Tel. Co., 42 AD2d, supra, at 163 [Witmer, J., dissenting]). Anderson further states that, even if the telephone company were theequivalent*236 of a publisher, it would be protected from liability under the facts presented. This statement was based on the qualified immunity which, at common law, had been accorded to telegraph companies which, due to their employees' participation in the transmission of messages, were considered "publishers" with respect to potential liability based on defamation.

The common law has always recognized a qualified privilege for telegraph companies that transmit defamatory messages submitted by their customers pursuant to which the defendant can be held liable only upon a showing of actual malice, that is, knowledge of the falsity of the message, a showing which a plaintiff will rarely if ever be able to make (see, Restatement [Second] of Torts § 612 [2]; see also, Matter of Figari v New York Tel. Co., 32 AD2d 434, 447; Klein v Western Union Tel. Co., 257 App Div 336; Mason v Western Union Tel. Co., 52 Cal App 3d 429, 125 Cal Rptr 53; Western Union Tel. Co. v Lesesne, 182 F2d 135; O'Brien v Western Union Tel. Co., 113 F2d 539; Von Meysenbug v Western Union Tel. Co., 54 F Supp 100; Annotation, Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages, 91 ALR3d 1015; Sack and Baron, Libel, Slander, and Related Problems § 6.3.1). In Anderson, the Court extended that privilege to the telephone company as well.

We are aware, of course, of the decision in Stratton Oakmont v Prodigy Servs. Co. (Sup Ct, Suffolk County, May 24, 1995). In

that case, the Supreme Court held that Prodigy had been shown to have exercised editorial control over a financial bulletin board to the extent that it could be considered the publisher of a defamatory posting, which contained defamatory statements concerning the plaintiff, and which had been placed on the bulletin board by a third party. For several reasons, Stratton Oakmont is not controlling here.

First, it is obvious that the Stratton Oakmont rationale would apply, if at all, only to the portion of the plaintiff's amended complaint which related to the bulletin board postings. Whatever editorial control over such postings might have been possible, it is clear from the present record that a service provider such as Prodigy cannot screen all of the e-mail sent by its subscribers.

Second, the evidence in the record in Stratton Oakmont describes the efforts at editorial control which, according to the evidence in the present record, Prodigy in fact abandoned in January 1994, prior to the events underlying the present complaint. *237 Thus, the decision in Stratton Oakmont was made in an entirely different factual context.

Third, the Anderson decision, discussed at length above, states that a telecommunications company can be considered a publisher of those messages in whose transmission it actually participates. It does not hold that such a company, if it were to participate in the formulation of the text of one or two messages, would thereupon expose itself to liability based on the text contained in the millions of other messages in whose transmission it did not participate. It is, in other words, irrelevant if Prodigy, in

the case at hand, is shown to have exercised the power to exclude certain vulgarities from the text of certain messages. What matters is that there is no proof that any such control was exercised in connection with the transmission of the messages complained of by the plaintiff.

Fourth, as outlined above, the Anderson case establishes the rule that even a telecommunications company which in some measure participates in the transmission of a libelous message cannot be held liable unless it knew that the message was in fact libelous, a circumstance which will rarely, if ever, be proved. The common-law privilege which benefits telegraph companies must apply to internet service providers as well. E-mail is, in substance, nothing but an updated version of the telegraph.

Our disagreement with the holding in Stratton Oakmont is not only compelled by our understanding of the holding of the Court of Appeals in Anderson, but is also dictated by at least one simple consideration of fairness. The Stratton Oakmont court itself acknowledged that a purely passive on-line service provider would face no liability based on the transmission of defamatory material through its services. Liability was imposed on Prodigy in that case solely because Prodigy had attempted, to some extent, to control the text of the various messages placed on its bulletin boards. The Stratton Oakmont holding "appear[s] to encourage systems operators to ignore the content on their bulletin boards in order to attain the much-preferred 'distributor' status" (Sanford, Libel and Privacy § 8.4.10 [2d ed]). Thus, in Stratton Oakmont Prodigy was punished for allegedly performing in an inadequate way the very conduct (exercise

of editorial control) which, initially, it had no legal duty to perform at all. The rule of law announced in Stratton Oakmont discourages the very conduct which the plaintiff in Stratton Oakmont argued should be encouraged.

The plaintiff in this case argues that Prodigy exposed itself to tort liability by parties with whom it had no contractual relationship *238 when it allegedly failed to adhere to the commitments it made to its subscribers in its Service Member Agreement (hereinafter the agreement). This argument fails for several reasons. Most basically, the text of this agreement actually provides that "Prodigy reserves the right (but is not obligated) to review and edit any material submitted for display" (emphasis added). This provision negates any possible extension of tort liability to third parties based on any alleged failure, on the part of Prodigy, to monitor its bulletin boards.

Our application of the holding of the Court of Appeals in Anderson results in our being in complete harmony with the expanding body of case law which supports the general proposition that an on-line service company such as Prodigy is not liable for damages when its services are misused by a third party who transmits an offensive or libelous text. In Cubby, Inc. v CompuServe, Inc. (776 F Supp 135 [SD NY]), for example, the court held that the defendant, another on-line service provider, was not liable for the posting of a defamatory notice on an electronic bulletin board. The court stated, "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for

potentially defamatory statements than it would be for any other distributor to do so" (Cubby, Inc. v CompuServe, Inc., supra, at 140; see also, Doe v America Online, 718 So 2d 385 [Fla]; Zeran v America Online, 958 F Supp 1124, affd 129 F3d 327, cert denied ___ US ___, 118 S Ct 2341; Blumenthal v Drudge, 992 F Supp 44).

Our application of the common-law qualified privilege recognized in Anderson also renders the outcome in this case in complete harmony with current Federal statutory law contained in the Communications Decency Act of 1996 (47 USC § 230). We need not decide what is thus the essentially academic question of whether this Federal statute would apply to all or part of the allegations of the plaintiff's amended complaint.

Finally, we note that the internal Prodigy memoranda are shielded by the common interest privilege, and that there is no proof of actual malice in this respect (see, Liberman v Gelstein, 80 NY2d 429). The remaining theories upon which the plaintiff proposes to impose liability on Prodigy are patently meritless.

III

For the foregoing reasons, the order entered January 14, 1998 is reversed, on the law, and Prodigy's motion for summary *239 judgment is granted. The appeal from the order entered July 2, 1997 is dismissed as academic in light of this determination.

Miller, O'Brien and Friedmann, JJ., concur.

Ordered that the order entered January 14, 1998 is reversed, on the law, the defendant's motion for summary judgment is granted, the amended complaint insofar as

asserted against the appellant is dismissed, and the action against the remaining defendants is severed; and it is further,

Ordered that the appeal from the order entered July 2, 1997 is dismissed as academic in light of our determination of the appeal from the order entered January 14, 1998; and it is further,

Ordered that the appellant is awarded one bill of costs.*240

Copr. (c) 1999, Alexander Treadwell, Secretary of State, State of New York.

N.Y.A.D.,1998.

LUNNEY v PRODIGY SERVS. CO.

END OF DOCUMENT

SUPREME COURT - STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY

To commence the statutory time period of appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON 1-14-1998
WESTCHESTER
COUNTY CLERK

PRESENT: HON. JOAN B. LEFKOWITZ
Justice

Index No.: 21886/94
Motion Date: 1/9/98

----------x

ALEXANDER G. LUNNEY, AN INFANT, BY HIS FATHER AND NATURAL GUARDIAN, J. ROBERT LUNNEY

Plaintiff(s),

-against-

PRODIGY SERVICES COMPANY (A PARTNERSHIP OF SEARS, ROEBUCK & CO. AND INTERNATIONAL BUSINESS MACHINES CORP.), JOHN DOE I AND JOHN DOE II,

Defendant(s).

----------x

The following papers numbered 1 to 25 read on this motion by plaintiff for summary judgment.

	Papers Numbered
Notice of Motion/Order to Show Cause' Affidavits	1-2
	3
Answering Affidavits	4
Replying Affidavits	
Affidavits	
Filed Papers	

Pleadings – Exhibits – Stipulations – Minutes 5-22
Briefs: Plaintiffs/Petitioner's 23 Def. Resp. 24-25

Upon the foregoing papers it is ORDERED that this motion is denied. This is defendant Prodigy's third motion for summary judgment. The prior two motions were denied without prejudice on July 3, 1996 and July 1, 1997. Movant refers the Court to its previous submissions in support of the motion. This is improper. It is not the functiopn of the court to requisition the County Clerk's file to review this material. Furthermore, the prior submissions are outdated and relate to the original complaint, not the amended complaint. Consequently, since movant has failed to produce an appropriate record, the Court declines to rule on the merits.

Lunney & Murtagh, LLC
Attorneys for Plaintiffs
81 Main Street
White Plains, New York 10601

Phillips Nizer Benjamin Krim & Bellon, LLP
Attorneys for Defendants
666 Fifth Avenue
New York, New York 10103-0084

DATED: January 13, 19998 ENTERED: /S/ Joan B. Lefkowitz, J.S.C.

JOAN B. LEFKOWITZ, J.S.C.

SUPREME COURT - STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY

To commence the statutory time period of appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON 7-2-1997
WESTCHESTER
COUNTY CLERK

PRESENT: HON. JOAN B. LEFKOWITZ

Justice

Index No.: 21886/94
Motion Date: 6/27/97

----------x

ALEXANDER G. LUNNEY, AN INFANT, BY HIS FATHER AND NATURAL GUARDIAN, J. ROBERT LUNNEY

Plaintiff(s),

-against-

PRODIGY SERVICES COMPANY (A PARTNERSHIP OF SEARS, ROEBUCK & CO. AND INTERNATIONAL BUSINESS MACHINES CORP.), JOHN DOE I AND JOHN DOE II,

Defendant(s).

----------x

The following papers numbered 1 to 52 read on this motion by defendant for summary judgment and motion by plaintiff for leave to amend the complaint.

	Papers Numbered
Notice of Motion/Order to Show Cause' Affidavits	1-3
Second Motion	4-5
Answering Affidavits	6-10
Replying Affidavits	11
Affidavits	
Filed Papers	

Pleadings – Exhibits – Stipulations – Minutes 12-47
Briefs: Plaintiffs/Petitioner's 47 Def. Resp. 51-52

Upon the foregoing papers it is ORDERED that this motion is denied without prejudice. Cross-motion is granted. The causes of action asserted in the amended complaint are not time-barred (CPLR 208) and relate back to the original claim in libel (CPLR 203[F]). After conclusion of pretrial discovery concerning the new allegations, defendant may renew its motion. Plaintiff shall serve the amended complaint within twenty (20) days hereof.

Lunney & Murtagh, LLC
Attorneys for Plaintiffs
81 Main Street
White Plains, New York 10601

Phillips Nizer Benjemin Krim & Ballon, LLP
Attorneys for Defendant
666 Fifth Avenue
New York, New York 10103-0084

DATED: July 1, 1997 ENTERED: /S/ Joan B. Lefkowitz, J.S.C.

JOAN B. LEFKOWITZ, J.S.C.

SUPREME COURT - STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY

To commence the statutory time period of appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED AND ENTERED
ON 7-5-1996
WESTCHESTER
COUNTY CLERK

PRESENT: HON. JOAN B. LEFKOWITZ

Justice

Index No.: 21886/94
Motion Date: 6/3/96

----------x

ALEXANDER G. LUNNEY, AN INFANT, BY HIS FATHER AND NATURAL GUARDIAN, J. ROBERT LUNNEY

Plaintiff(s),

-against-

PRODIGY SERVICES COMPANY (A PARTNERSHIP OF SEARS, ROEBUCK & CO. AND INTERNATIONAL BUSINESS MACHINES CORP.), JOHN DOE I AND JOHN DOE II,

Defendant(s).

----------x

The following papers numbered 1 to 49 read on this motion by defendants for summary judgment and motion by plaintiffs for continued discovery.

	Papers Numbered
Notice of Motion/Order to Show Cause' Affidavits	1-3
Second Motion	4-5
Answering Affidavits	6-7
Replying Affidavits	8-9
Affidavits	
Filed Papers	

Pleadings – Exhibits – Stipulations – Minutes 10-46
Briefs: Plaintiffs/Petitioner's 47 Def. Resp. 48-49

Upon the foregoing papers it is ORDERED that this motion is denied without prejudice to renewal on completion of discovery. Plaintiffs' motion for continued discovery is granted. At this time the Court cannot rule as a matter of law that defendant Prodigy is not a publisher in view of the powers it reserves in its service agreement. Stratton Oakmont, Inc. v. Prodigy Service Co., 23 Media L. Rep. 1794 (Supreme Ct. New York 1995). On any renewed motion the parties shall focus upon Stratton's viability in light of the Telecommunications Act of 1996 (Pub. Law 104-104) and ACLU v. Reno, 1996 WL 311865 (ED Pa. 6/11/96).

Submit order on notice which order shall specify the documents sought and the time for production or for an affidavit of diligent search and inability to produce the documents.

Lunney & Murtagh, LLC
Attorneys for Plaintiffs
81 Main Street
White Plains, New York 10601

Frankfurt Garbus Klein & Selz, Esqs.
Attorneys for Defendants
488 Madison Avenue
New York, New York 10022

DATED: July 3, 1996 ENTERED: /S/ Joan B. Lefkowitz, J.S.C.

JOAN B. LEFKOWITZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

Index No.: 21886/94

AFFIDAVIT OF ALEXANDER G. LUNNEY

ALEXANDER G. LUNNEY,
Plaintiff,

-against-

PRODIGY SERVICES COMPANY (A PARTNERSHIP OF SEARS, ROEBUCK & CO. AND INTERNATIONAL BUSINESS MACHINES CORP.) JOHN DOE I AND JOHN DOE II,

Defendants.

----------x

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.

ALEXANDER G. LUNNEY, being duly sworn, says:

1. I am the plaintiff and submit this affidavit, in opposition to defendant Prodigy Services Company's third motion for summary judgment. I am familiar with the facts set forth herein.

2. This action against Prodigy and John Doe I and John Doe II contains three causes of action, (1) libel per se, (2) negligence, and (3) harassment/infliction of emotional distress. At issue are statements published by Prodigy on its Network, through fictitious accounts, in the name of plaintiff that contain vile obscenities including criminal threats of assault, sodomy and murder. In addition, I am accused by Prodigy as a delinquent debtor and a credit card fraud. I was then 15 years of age, residing at 3 Locust Lane, Bronxville, NY, and a student at the Bronxville High School. I was never member of Prodigy. Prodigy in its answer, has entered a general denial, but admits that it has implemented software on its bulletin board system that scans notes for certain words and /or phrases.

3. Prodigy Services Company is a partnership of Sears Roebuck & Co., a major U.S. retailer, and International Business Machines, Corp., an international computer manufacturer, programmer and retailer of computer services. Prodigy was created to provide access for these major corporations to the emerging market for "on line" services, including direct sales of goods and services to members through their home computers. A primary concern of Prodigy was establishing itself in this market and "how quickly someone could have full access to the full Prodigy service and sign up for... the more expensive parts of the service...[Members] had to have full access in their [Prodigy's marketing people] eyes." Deposition, Alexander Bidwell, Program Manager for Security at Prodigy, January 19, 1996 (pp. 21-22), Exhibit A.

4. At the time of the obscene and libelous messages published on its Network, Prodigy was negligently soliciting members by solely requesting any name and address. Indeed, a person would be on line in Prodigy after giving a fictitious name and address without payment and

[Aff'd p. 2]
could be on for as long as 4 months before being disconnected for failure to pay. Prodigy employed no process for verification of the bona fides of any person applying for membership.

THERE CAN BE NO DOUBT THAT THE COMMUNICATIONS PUBLISHED BY PRODIGY AND ATTRIBUTED BY IT TO PLAINTIFF WERE LIBELOUS, OBSCENE AND ACTIONABLE

5. The gravamen of this action arises from the publishing of libelous, vile and gross obscenities attributed by Prodigy to me, a minor, including the following:

(a) "READ A MESSAGE 9/12/94

From: ALEX LUNNEY (EGYD83A)
Subject: HOW I'M GONNA' KILL U
Sent on: 09/09 at 04:30PM

YOU PIECE OF SHIT. I'M FUCKING ALEX LUNNEY OF TROOP ONE AND I'M GONN'A KICK YOUR ASS, YOU FAT PIECE OF SHIT! I WANT TO BUTT FUCK YOUR SONS ONE AT A TIME AND THEN I'M GONNA' SHOW YOUR WIFE HOW A REAL BOY SCOUT PITCHES A TENT!

ALEX LUNNEY

(b) BULLETIN BOARD PAGE 38...

CLUB: SPORTS SUBMITTED: 09/07/94 16:30:55
TOPIC: BASKETBALL...FROM...ALEX LUNNEY
SUBJECT B/BALL... TO: MIKE MULLEN

LINE #1----->YEAH MIKE. SHE GETS HOME FROM THE WHOREHOUSE AT NOON, YOU
LINE #2----->CAN "ORDER" HER SERVICES THEN.

* * *

LINE #5-----> ALEX

(c) ...BULLETIN BOARD PAGE 14...

CLUB: SPORTS SUBMITTED: 09/05/94 15:16:49
TOPIC: BASKETBALL.. FROM ...ALEX LUNNEY
SUBJECT: B/BALL... TO: ...JENNIFER WILSON

LINE#1 ----> HEY JENNIFER, BLOW ME!

6. These vile and obscene statements were published by Prodigy on its Network, through fictitious accounts opened by a person unknown to plaintiff and whom Prodigy has failed and refused to identify. On the evening of September 12, 1994 I was at home when confronted by my Boy Scout Leader with the first of these obscene messages published by Prodigy and attributed to me through memberships falsely opened by Prodigy in my name. Deposition, Alexander G. Lunney, November 10, 1995 (pp 34, et seq). Exhibit B.

7. So far in discovery, plaintiff has uncovered at least nine fictitious memberships opened by Prodigy in my name. Also, through discovery plaintiff has uncovered scores of other fictitious accounts, opened by Prodigy throughout the country under a multitude of names.

[Aff'd p. 3]

8. Fictitious memberships opened by Prodigy, uncovered during discovery, include the following:

ID	ADDRESS	CITY
(1) KQPZ79	ALEX LUNNEY 3 LOCUST LA.	BRONXVILLE, NY
(2) UEYV21	ALEX LUNNEY 3 LOCUST LA.	BRONXVILLE, NY
(3) HBUS49	DR. ALEX LUNNEY MD 3 LOCUST LAN	BRONXVILLE, NY
(4) GQEU10	ALEX LUNNEY	

(5) CHUY08 3 LOCUST LA. BRONXVILLE, NY
ALEX D. LUNNEY

(6) EGYD83 3 LOCUST LA. BRONXVILLE, NY
ALEX N. LUNNEY

(7) FYDK55 3 LOCUST LA. BRONXVILLE, NY
ALEX LUNNEY

(8) HGRZ83A. 40 NORTH RD. BRONXVILLE, NY
DIRTY NIGGER

(9) KQWY85. 40 NORTH RD. BRONXVILLE, NY
BAD NIGGER

(10) KQNL85 40 NORTH RD. BRONXVILLE, NY
ALEX LOONEY

(11) QPMN43 3 LOCUST LA. BRONXVILLE, NY
ALEX LUNNEY

FUCK YOU, FUCK YOU,
NEVADA

9. By letter from Gray, TN, on September 14, 1994, Prodigy falsely accused me of transmitting abusive, obscene, and sexually explicit material through the Prodigy service. After receiving my vigorous denial of September 23, 1994, and demands for all relevant material, Prodigy, by instructions published on its Network, ordered all its personnel to give me no information. In addition, by its Subscriber Memo Display, all Prodigy personnel were warned, "DO NOT DISCUSS ANY INFORMATION ABOUT THIS ACCOUNT TO THIS MEMBER." This willful intention by Prodigy to suppress all information was displayed by notices transmitted by Prodigy on each of the fictitious memberships opened by Prodigy in my name.

10. Then to top it off, Prodigy, through its Network, maliciously published a false notice that, "ALEX LUNNEY HAS BEEN TERMINATED FOR CC[CREDIT CARD] FRAUD AS WELL AS OBSCENE MATERIAL." The next step Prodigy took was to publish on its Network the false accusation that Alexander, "IS A NON-PAY, DISCONNECT SUBSCRIBER 143 DAYS DELINQUENT." These malicious notices were being

transmitted by Prodigy months after this action was commenced. None of these libelous notices and obscene messages published by Prodigy have ever been rescinded.

11. These abusive publications in my name were not singular nor isolated examples of what Prodigy was publishing. Through discovery plaintiff has uncovered death and rape threats published on other fictitious memberships by Prodigy. Prodigy opened scores of fictitious memberships in the names of plaintiff and various members of the Borges family at 40 North Rd., Bronxville, NY. On September 3, 1994 Prodigy published the following notice on its Network:

> INDIVIDUAL FROM WHITE PLAINS CALLED IN AND STATED THAT THIS MEMBER HAD BEEN FORWARDING DEATH THREATS AND RAPE THREATS TO ONE OF THE MEM REPS....

This notice was published by Prodigy on its Subscriber Memo Display for the fictitious membership (AYRT 25) it had opened in the name of Dr H. Alexandre Borges, 40 North Rd., Bronxville, NY. (an address also used by Prodigy when it opened another fictitious membership in my name).

12. Prodigy opened scores of false and fraudulent memberships in my name and for various members of the Borges family using the address of 40 North Road, Bronxville, N.Y. Samples of the vile and obscene Bulletin Board postings published in September 1994 by Prodigy on the fictitious Borges memberships at 40 North Rd. include the following:

[Aff'd p. 4]

(a) "I WANT TO FUCK ALL YOU YOUNG LADIES OUT THERE AND I AM WILLING TO PAY FOR

YOUR TIGHT LITTLE PUSSIES. I ALSO DIG PHONE SEX SO CALL ME AT (914)-793-7984. I ALSO DIG ANAL FUCKS."

(b) "ANYONE WHO WATCHES WRESTLING OR PAYS $30.OO FOR SOME RIPP OFF PAY-PER-VIEW EVENT IS A FAG, WHO SHOULD BE AT A QUEER BAR GETTING RAMMED UP THE BUTT. AND I DON'T GIVE A CRAP IF YOUR MEMREP, WHO MUST BE THE KING OF ALL YOU LOSERS SEES THIS BECAUSE SHE IS JUST AS FRUITY AS YOU."

(c) "I HAVE RAPED OVER 40 WOMEN IN THE LAST YEAR, INCLUDING MY AUNT AND GRANDMOTHER. I FIND IT ENJOYABLE AND WONDER IF ANY OF [YOU] OUT THEIR (SIC) AGREE."

13. The reason that a perpetrator was able to publish these abusive and sexually explicit materials on the Prodigy Bulletin Boards for viewing by millions was that Prodigy negligently solicited fictitious memberships from anyone supplying any name or address. The proof of this can be seen in several postings published by Prodigy where the perpetrator brags that if he gets "thrown off I'll just find another identity and get on again." Significantly, the perpetrator admits that , "I don't want to pay for this so I bill it to other people." These postings (on a fictitious Borges membership) were published for viewing by millions of Prodigy members:

(a) "I'M ALEX BORGES AND I MEANT IT WHEN I SAID I WAS GOING TO RAPE YOU UNTIL YOU BLED YOU WORTHLESS WHORE. GO AHEAD AND GET ME THROWN OFF. I'LL JUST FIND ANOTHER IDENTITY AND GET ON AGAIN. I CAN SAY WHATEVER I WANT AND THERE'S NOTHING YOU CAN DO! HAVE A NICE DAY!"

(b) "BOBBY, YOU'RE VERY SMART AND VERY CORRECT. ACTUALLY I DON'T WANT TO PAY FOR THIS SO I BILL IT TO OTHER PEOPLE."

PRODIGY NEGLIGENTLY OPENED SCORES OF FICTITIOUS MEMBERSHIPS WITH FRAUDULENT CREDIT CARDS AND PHONY ADDRESSES

14. It has been uncovered through discovery that Prodigy negligently opened scores of memberships using dozens of fraudulent credit cards. For example, fraudulent credit card #4128368249648106 was used by Prodigy to open at least 8 memberships including ALEX LUNNEY (QPMN43), Fuck You, Fuck You, NV and A DIRTY NIGGER (HGRZ83), 40 North Rd., Bronxville, NY.

15. Over 58 fictitious memberships were negligently opened by Prodigy, during 1994-95, all using the private residence address of the Borges family, 40 North Rd., Bronxville, NY, including the following:

(a) ALEX LUNNEY (FYDK55)
(b) A DIRTY NIGGER (HGRZ83)
(c) A BAD NIGGER (KQWY85)
(d) BILL FUCKER (PKLU35)
(e) ASSHOLE FUCKFACE(RFAN68)

A list of fictitious memberships opened by Prodigy with fraudulent credit cards is attached as Exhibit C.

16. Bidwell testified that for years, up to and including 1993 and 1994, Prodigy was experiencing a "lot of abuse" "on its systems. Abuse to other members, using multiple fraudulent memberships really "heated up in 1993". The abuse included obscenity and abusive messages. "[T]he whole gamut" of "illegal and improper use" of the Prodigy network was reported by Bidwell to an array of senior

management, "I talked to . . . my director, my vice president, and
[Aff'd p. 5] the counsel and general counsel" who did nothing. Members would break into other peoples' ID's and run scams in bulletin board postings including abusive E-Mail. Bidwell, pp. 13-15.

PRODIGY HAD THE RIGHT AND ABILITY TO CONTROL MESSAGE CONTENT AND ABUSIVE USER ACTIVITY

17. Prodigy has admitted in publicly available documents and has been found to be a publisher, rather than a distributor, exercising editorial control. Prodigy has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Stratton Oakmont, Inc. v. Prodigy Services Co., 23 Media L. Rep. 1794, 1995 N.Y. Misc, Lexis 229 (N.Y. Sup. Ct., Nassau Cty., May 24, 1995) motion to renew denied, slip op. (December 11, 1995) Index No. 31063/94.

18. Willard P. McDowell, Jr., the Member Security representative for Prodigy testified at his deposition on March 2, 1995 that Prodigy has retained the right to edit and review. "[T]hat tends to relate to posting on the service, which would be a bulletin board situation, or CHAT today. And Prodigy has reserved the right to screen those and reject them if they choose to, or to not screen them." Exhibit D, pp. 110-11.

19. McDowell further testified, "I think it's fair to say we review virtually all for some things, some things being obvious obscenities; that's done electronically. And, in fact, other things they review—some of them are not reviewed at all; some of them are reviewed at random." He further testified that, "they are mechanically reviewed or

programmatically reviewed for words that cannot be used on Prodigy." pp. 111-12. Indeed, in its Answer Prodigy admits that it has implemented software on its bulletin board system that scans notes for certain objectionable words and phrases.

20. Prodigy advertises itself as a computer on-line service, family interactive network with 2 million members, including more than 300,000 children. Members are encouraged to send electronic messages and communicate with one another on the network in accordance with guidelines as to the content of such communications established by Prodigy. Prodigy reserves the right to remove or refuse to send messages offensive to its own guidelines. See Prodigy Service Member Agreement, Exhibit E.

21. Some editing is done by an electric scanner known as the "dirty word editor" which is part of the mainframe Prodigy system, as testified to by McDowell at pp. 112-13. The Service Member Agreement prohibits sending and posting abusive, obscene, profane, sexually explicit or threatening illegal material. Significantly, McDowell testified that the Prodigy prohibition applies to both Bulletin Board and E-Mail messages. P. 118.

22. Interestingly, Prodigy in February 1997, as compelled by order, produced a document dated January 22, 1997 (Exhibit F), from its Interactive Personal Service (copyright 1997) which shows that it continues to edit and review. Indeed, Prodigy restates its "right to reject any note at any time for any reason." Prodigy reaffirms its "right to return notes that contain information that may interfere with Prodigy functions or adversely affect our business interests." Indeed, Prodigy states that it is

committed to open debate, "but this doesn't mean that 'anything goes'."

23. Ironically, Prodigy markets its programs for "Home/Family/Kids" and one of its stated corporate missions is to have children connect with their world through entertainment. Prodigy holds itself out as a unique, high quality, high performance service of choice that provides the
[Aff'd p. 6]
greatest value, is the easiest to use and offers the most enjoyment for the entire household. McDowell,(pp. 18-21).

PRODIGY NEGLIGENTLY SOLICITED MEMBERS KNOWN TO BE USING FALSE IDENTITIES AND CREATING THE VERY RISK AT ISSUE HERE

24. At the time the obscene messages were published on its Service, Prodigy was intentionally soliciting members by merely requesting any name and address. Nothing more was required even though Prodigy's security personnel had for years recommended that steps be taken to verify the bona fides of the persons seeking access to its Network. Prodigy was well aware of the risk that new members may be giving false information, including the use of fictitious identities or the misuse of another person's identity, as was the case here. McDowell (p.48).

25. McDowell admitted that Prodigy was "the only on-line service that allowed paper billing, i.e., that didn't require a credit card, and that process was not in keeping with the nature of on-line service." (p. 42-43.) He conceded that "people were enrolling in Prodigy services [using false information] and it was taking us too long to find out, providing a less secure environment... ." (p. 43.) The leading on-line services required a credit card, which

allowed verification of the member's identity and address, but Prodigy did not require even this basic verification. (p. 50.)

26. As Program Manager for Security at Prodigy, Bidwell, admitted that for years Prodigy was concerned that it was opening accounts in the names of persons who had not authorized the use of their names. (pp. 13-15), see also McDowell (pp. 46-48). Prodigy was aware and Bidwell put it on notice that there was a "lot of abuse" including abusive messages posted on it's Service. (pp. 13-15). Although Bidwell reported these problems to his superiors at Prodigy, "they were doing nothing except waiting for the bills to be paid." He acknowledged that the stated policy at Prodigy was, "its more important to get the business started and, you know, we will deal with the abuse as it comes up." (p. 16). Bidwell unsuccessfully recommended, prior to the abusive and obscene messages at issues here, that access to the Prodigy "environment" be denied until at least the names and addresses of applicants for membership were verified. (p. 17).

27. Prodigy's over-riding concern was that even a minimal attempt to verify the identity of a member may delay or discourage that member from coming "on-line" and immediately purchasing goods or the more expensive services offered by Prodigy. "We are really talking about risk-taking and risk management," Bidwell testified. (p.18). Despite the known risks of its "open enrollment" policy and Bidwell's recommendations, "Prodigy decided it was too much of a business risk to follow all the recommendations [he] had made."

28. In addition, Bidwell testified that while he was "pressing for verification and checking of new enrollments at Prodigy" he proposed an 'activity risk model."(pp. 41-

42). The risk model "measured number of bulletin board postings, number of E-mails sent, purchases, made...and we set thresholds...and we developed a procedure [to] suspend these accounts." (p. 42). This risk model was designed to be applied across the board to new members (p.43). The essential purpose of this model was to identify potential abusive activity early upon the opening of a membership and to "suspend these accounts and contact them and ask them if they indeed were using the account." (p.42). Bidwell, however, admits that Prodigy failed to develop this procedure or any other when publishing the vile and libelous messages at issue here. See also McDowell, (pp. 30-32).

[Aff'd p. 7]

29. Prodigy was unique in the computer on-line service industry in not verifying the identity of a prospective member. The major on-line services (e.g. CompuServe; America Online) require that the identities of members be verified before access was allowed to their systems. (Id., pp. 18-19), see also McDowell, (p. 50). For some unexplained reason, Prodigy decided that Bidwell's recommendations, even for minimal steps, to verify a member's identity or other profile information, "wouldn't work for them." (p. 21).

30. Essentially, Prodigy decided that rather than risk the potential loss of business it would risk publication of the vile, obscene and libelous messages it had found endemic in the opening of unauthorized and fictitious memberships. Indeed, even after a member was enrolled the "problem" Prodigy primarily addressed was the failure of the member to pay. McDowell, (pp. 36-37). Although Prodigy was authorized by its members to police the content of messages sent on its Service, virtually the only warning heeded by Prodigy as to fictitious memberships was the

non-payment of service charges, which would not result in the termination of the abuse for periods as long as four months. McDoweil, (pp. 35-39).

THERE IS NO PRIVACY INTEREST TO BE PROTECTED AND PRODIGY IS HIDING BEHIND "FICTITIOUS" NOTIONS OF PRIVACY TO COVER-UP ITS NEGLIGENCE

31. Prodigy attempts to avoid its responsibility for these publications by claiming to be something that it is not and characterizing the messages mysteriously as "E-Mail." In the first instance at least two of the messages published in plaintiff's name are clearly labeled by Prodigy itself as "Bulletin Board" messages and thus were posted for general viewing by millions of Prodigy members. How many more of these messages exist is an open question given Prodigy's failure to provide full discovery. Indeed, Prodigy's prior counsel upon producing copies of some messages wrote that, although, "not generally known..., Prodigy has the ability to retrieve this information." Thus, to this date, nothing has been expunged from its Network.

32. With regard to so-called "E-Mail" messages, Prodigy is not the post office or a telephone monopoly governed by strict utility regulations. The privacy of computer transmitted messages as they are being published is governed by the agreement of the on-line service provider and its members. If the message is in computer storage, as it must be if placed in the addressee's computer "mailbox", there is nothing prohibiting a service provider, such as Prodigy, from access to the messages to assure a members' compliance with the "Content Guidelines" promulgated by Prodigy.

33. Moreover, both the addressee and the addressor can authorize the release of any message. Plaintiff, the purported addressor has authorized, indeed unsuccessfully demanded, the release of all member information as well as all transmissions in all fictitious memberships opened in his name by Prodigy. As part of its so-called "investigation" Prodigy never sought the consent of the addressees of these vile and obscene messages to release either the content or other particulars of these publications. There is no reason to assume they would withhold such consent. Prodigy is improperly hiding behind the veil of privacy of a person who does not exist or has identified himself as some one he is not in order to cover up its own negligence and libel. Such a trespasser could have no expectation of privacy. Indeed, New York does not recognize common law claims for invasion of privacy.

THE PERPETRATOR IS AN INSIDER AT PRODIGY

34. Documents that have been produced by Prodigy, after four orders compelling production, point to an insider at Prodigy as the perpetrator, obviously an issue that Prodigy does not wish to

[Aff'd p. 8] explore. On November 8, 1993, Scott McGrath, a former Prodigy employee, met with Bidwell at the Paparazzi Restaurant, 1 North Broadway, White Plains, NY. At that meeting McGrath delivered a 2-page memorandum to Bidwell (Exhibit G). This memorandum confirms that, "There have been death threats and things ordered online which are delivered to the members home address with obscenities..." The memo delivered to Bidwell goes on to state that, "Prodigy's response to all this has been to seemingly ignore the problem and only pull notes after they are complained about instead of taking a pro-active approach to the situation".

35. McGrath states that he resisted the notion of an insider at Prodigy except for certain things. "These things include access to the operations and/or coverage area in Yorktown where there's a TPF system console for obtaining passwords, access to member information available to people in MSS, access to Mike Greenbaum and Ross Glatzer's [Prodigy's Chief Executive Officer] mailboxes and access to the BB[Bulletin Board} Leaders. All of which would be required to do the things which have been done".

36. McGrath states positively that an insider at Prodigy is involved and goes on in his memo instructing Prodigy on how to uncover the perpetrator. However on March 31, 1994, after more than four months of "Bidwell's blocking the investigation" McGrath wrote to Louis Gerstner, Chairman of IBM Corporation (Prodigy is a partnership of IBM and Sears Roebuck). McGrath had started passing information from victims to Bidwell and in his letter (Exhibit H) he discloses that, "Among the information passed to [Bidwell] were complaints of member-to-member E-mail being discussed openly by the harassers on the Prodigy Bulletin Boards." Prodigy claims that it can't identify the perpetrator. However, McGrath frankly states that, "I found out that the information put out by the various Board Leaders and MemReps about [Prodigy's] lack of ability to trace these lines were out and out lies."

37. Indeed, the IBM Senior Vice President and Group Executive on June 24, 1994, instructed Prodigy "to make improvements to the verification process for new users." This request came about after abuses on the Network were experienced. The IBM Senior Vice President told Prodigy "to benchmark you verification and timing against your competitors...".(Exhibit I). Unfortunately, Prodigy refused to follow his advice.

PLAINTIFF HAS SUFFERED DAMAGES.

38. Contrary to Prodigy's argument that E-Mail messages on its Service are subject to special privacy restrictions, its Service Member Agreement allows Prodigy to monitor the content of the stored E-mail messages for conformity to its Content Guidelines. Prodigy, inexplicably decided not to do what the law and its Service Member Agreement allowed it to do.

39. Statements attributed to plaintiff including that plaintiff was a "killer [er]," rapist, sodomizer, procurer of a "whore" and a credit card fraud are published by Prodigy in the context of a supposedly wholesome family oriented on-line service. The statements attributing such criminal conduct to a 15 year old child must be held by this court for what it is, libel per se.

40. Despite Prodigy's attempt to twist the facts, the most vile, obscene and libelous statements were published by Prodigy and directed to a Boy Scout leader, Mr. John Satenstein. Mr. Satenstein's shock at the obscene threats against him and his family lead Mr. Satenstein to promptly report the matter to the Bronxville Police Department. Simultaneously, Mr. Satenstein reported the matter to plaintiff's own Scout Master, who immediately confronted plaintiff, at his home, in the presence of his mother, with the vile and libelous message and demanded an explanation. Within hours of receipt of the message the Police and plaintiff's Boy Scout leaders
[Aff'd p. 9] were on notice. Deposition, Alex Lunney, (pp. 34-36) Exhibit B. The Police immediately commenced an investigation.

41. I have testified, among other things, that I was humiliated and embarrassed by these events, suffered emotional distress, am apprehensive in my social contact with my Boy Scout leaders and their families, and suffer distress when Prodigy or the messages come to mind. Repeated harassing phone calls from persons representing that they are Prodigy members have been received by me at home at odd hours of the night. pp. 51-51, 63-70 and 78-90.

42. Prodigy's bald assertion that the Boy Scout leader did not believe the statements is nothing but rank speculation. The fact that Mr. Satenstein promptly reported the obscene and threatening messages to the Police and my Scout Master, who in turn confronted me shows the contrary--that they in fact were deeply concerned that I was the source and that my parents should be aware of the problem concerning their son, as they had every reason to believe from the message itself. In addition to the Police, plaintiff's Boy Scout leaders and their families, an untold number of Prodigy Members have nothing but the obscene and libelous messages by which to gauge the character and reputation of the plaintiff.

43. In any event, regardless of Prodigy's protestations, it was clear to Bidwell, its head of Information Security that this action deals with defamation and obscenity. When shown the complaint with its exhibit he testified, " . . .I think it's disgusting, obscene; it's disgusting." Bidwell, p. 29. Also see McDowell, pp. 127, 152, 155, 173.

44. Indeed, Prodigy itself wrote (9/14/94) accusing me of transmitting obscene and sexually explicit material and purporting to terminate me from use of Prodigy's Service. Then Prodigy issued explicit instructions to bar all information to me and to deny all my requests for information. In addition, months after this action was

commenced Prodigy falsely accused me of credit card fraud. These instructions have never been changed. Not only did Prodigy stonewall providing any information to me, but the stonewalling continued into this action, requiring four applications to this court to compel discovery.

WHEREFORE, it is respectfully requested that defendant Prodigy's third motion for summary judgment be denied in all respects.

/S/ Alexander G. Lunney

Alexander G. Lunney

Sworn to before me
December 1, 1997

/S/ [notary's signature]

Notary Public

CERTIFICATE OF SERVICE

Three copies of this *Petition for a Writ of Certiorari* were served upon counsel for Defendant-Respondent on this _____ day of February, 2000, by placing them in the U.S. Mail, first-class postage prepaid, addressed to:

Phillips Nizer Benjamin Krim & Ballon, LLP
Attn: Michael J. Silverberg, Esq.
666 Fifth Avenue
New York, N.Y. 10103
(212) 977-9700

Attorneys for Defendant-Respondent

All parties required to be served have been served.

Bruce A. Taylor
Counsel of Record for Petitioner